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November 15, 2006

Philip N. Hogen, Chairman
Cloyce V. Choney, Commissioner
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, D.C. 20005

Re: Comments of Miccosukee Tribe of Indians of Florida Concerning Proposed Rules on Class II Definitions, Class II Classification Standards, and Class II Technical Standards

Dear Chairman Hogen and Commissioner Choney:

On behalf of our client the Miccosukee Tribe of Indians of Florida ("Tribe"), we write to you as representatives of the federal government of the United States of America regarding the proposed regulations by the National Indian Gaming Commission ("Commission" or "NIGC") on the Definition for Electronic or Electromechanical Facsimile, published at 71 Fed. Reg. 30232 (May 25, 2006) ("Definition Regulations"), and Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming when Played Through an Electronic Medium using "Electronic, Computer, or other Technologic Aids," published at 71 Fed. Reg. 30238 (May 25, 2006) ("Classification Regulations," individually and collectively with the Definition Regulations, the "Proposed Rule"). We also write to you regarding the proposed regulations by the Commission on the Technical Standards for "Electronic, Computer, or Other Technologic Aids" Used in the Play of Class II Games, published at 71 Fed. Reg. 46336 (August 11, 2006) (the "Technical Standards Regulations, individually and collectively with the Proposed Rule, the "Proposed Regulations").

By prior letter of August 15, 2006, the Tribe through its counsel provided preliminary comments to the Proposed Rule. By the comments enclosed in this letter, we wish to supplement the preliminary comments submitted for the Tribe to the Proposed Rule and also to provide preliminary comments to the Technical Standards Regulations. We also provide comments on the Commission's Tribal Advisory Committee ("Advisory Committee") process apparently employed by the Commission in connection with its current rulemaking process as to the Proposed Regulations.

The manner of presentation by the Commission of the Proposed Regulations makes it difficult for the Tribe to provide comments or to participate in the Commission's rulemaking process.[1] The

[1] The NIGC's presentation of the Proposed Rule, as overlapping rulemaking efforts (which the NIGC treated as one rulemaking through its Advisory Committee process as discussed herein), with long, detailed proposed regulatory provisions, and accompanied by a long, varied notice as

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Tribe reserves the right to supplement, or to revise, its positions stated in the enclosed comments whether through additional written comments to the Commission or on review of any final rule.

I. Introduction.

Through the Proposed Rule, the federal government yet again seeks to unilaterally change the nature of its relationship with tribal governments. The same has been true with respect to any number of prior federal legislative and regulatory initiatives.[2]

Prior to the Indian Gaming Regulatory Act ("IGRA),[3] "existing federal law" did "not provide clear standards or regulations for the conduct of gaming on Indian lands."[4] Congress provided in the

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to the NIGC's apparent stated rationale for the rule, involves countless issues relating to the regulation of tribal gaming. The Proposed Rule by itself goes to important issues relating to the jurisdiction of tribal governments with respect to tribal gaming, the jurisdiction of the Secretary and the various states as to class III gaming, and detailed substantive and technical aspects of games played as class II gaming. At the same time, the NIGC has proposed very detailed technical standards for equipment used with class II gaming through the Technical Standards Regulations (which the NIGC also treated with the Proposed Rule as one rulemaking through its Advisory Committee process).

The form of the presentation by the NIGC as to the Proposed Rule, with the intertwined Technical Standards Regulations, makes it difficult to ascertain the NIGC's intentions as to new regulations, to present comments on the issues raised by the NIGC in the Proposed Regulations, or to participate effectively in the NIGC's rulemaking process. This difficulty extends to any alternative that the NIGC may pursue in response to comments received by the NIGC on the Proposed Regulations. Because of the manner and method of the NIGC's presentation as to the Proposed Regulations, collectively and individually, we believe that as to any final rule that adequate notice would not have been given by the NIGC with respect to any deviation as to the overall framework of the Proposed Regulations, or as to individual substantive provisions of the Proposed Regulations. *See United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 243 (1973) (stating that notice of a proposed action must fairly advise the public of "exactly what" the agency proposes to do); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988) (finding inadequate notice because the "summary" did not make reference to the model the agency adopted). Otherwise, the NIGC would essentially be violating the logical outgrowth rule. An additional public hearing and additional time to comment should be granted to tribal governments to fully assess and participate by written comments, or through true (see below) government-to-government consultation, with respect to the NIGC's overall regulatory initiatives as to class II gaming including the Proposed Rule and the Technical Standards Regulations.

We understand that the NIGC held a public hearing in Washington, D.C., on September 19, 2006, concerning the Proposed Rule. *See* Notice of Public Hearing, etc., 71 Fed.Reg. 44239 (August 4, 2006) (the "Notice"). We appreciate the NIGC's efforts to post on its website materials related to the Public Hearing and the Proposed Rule. However, the extent of the record from the public hearing is unclear and we undertake no obligation to comment on the record, unclear such as it is, from the public hearing. Additionally, the NIGC has apparently not posted any comments received by the NIGC to the Technical Standards Regulations even though the issues raised by the Technical Standards Regulations are intertwined with the issues raised by the Proposed Rule. The NIGC itself apparently still treats these matters as one issue by posting the Technical Standards Regulations on the same web page as the Proposed Rule.

We understand that the NIGC has undertaken additional study and analysis regarding the economic impact of the Proposed Rule. We also understand that the NIGC posed written questions by follow-up letter (with responses apparently due to the NIGC by September 30, 2006) from some or all of the panel participants at the public hearing. Unfortunately, we have not had an opportunity to review or to comment on such additional materials apparently currently held by the NIGC or not discussed in the NIGC's notice to the Proposed Regulations. Our comments herein may likely have included additional or different material if we had an opportunity to review the NIGC's additional materials including as to the economic impact of the Proposed Rule. We believe that fairness in the rulemaking process would have required additional time to submit these comments in light of the economic studies apparently undertaken and only recently released by the NIGC.

We understand that the Department of Justice ("DOJ") has a legislative proposal floating in Congress and that the legislative proposal affects the matters raised in the Proposed Rule. *See* Classification Regulations, *supra*, 71 Fed.Reg. at 30241 (the NIGC noting "So much time has elapsed that it is not *likely* that the proposed legislation will pass the 109th Congress," emphasis added). The existence but uncertain status of the DOJ's legislative proposal also makes it difficult to evaluate and to comment on the Proposed Regulations.

[2] America's history is riddled with a track record of striking deals with tribal governments and then unilaterally changing the deal as the United States pleases. Often times, the relationship is changed simply because the United States no longer likes the deal it entered into with a tribal government.

[3] 25 U.S.C. §§2701-2721 and 18 U.S.C. §§1166-1168. We refer to the codification in both Title 25 and Title18 as the "IGRA," or the "Act," except as noted. Our discussion in these comments as to the language or structure of the IGRA goes to class II bingo-related gaming except as noted.

IGRA that *all* tribal governments would have the opportunity to take advantage of *both* variety in game design, *i.e.*, the method of play, *and* advances in technologic aids used in the play, of class II bingo-related gaming (including the very games and technology threatened by the Proposed Rule and the Technical Standards Regulations).[5] As to certain specific bingo-like games in which the *method of play* is the same as live lottery games offered by State lotteries, and as to certain specific and limited technology,[6] Congress ostensibly limited tribal rights to play such games and such devices as class III gaming without a tribal-state compact or Secretarial procedures.[7] An abrogation of tribal rights should and does require a clear expression by Congress.[8] The fact that rights were taken away by the IGRA means that at the least tribal governments should be given the full advantage of the rights maintained by tribal governments under the IGRA.

For class II gaming, the Commission was created by Congress in the IGRA and given an important but *limited role of oversight*, principally as to class II gaming, of the exercise by tribal governments of the primary jurisdiction and regulation by tribal governments of tribal gaming. "*Oversight" does not mean "regulation"* as that term is applied by the Commission in the

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[4] 25 U.S.C. §2701(3); *see also, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-219 (noting that for decades the federal government's involvement in tribal gaming was limited to approval of tribal ordinances, the review of tribal bingo management contracts with third-parties, and the promotion of tribal gaming enterprises through economic incentives).

[5] S. Rep. No. 446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Ad. News 3071 ("Senate Report"), 3079 ("Consistent with tribal rights that were recognized and affirmed in the Cabazon decision, the Committee intends in [25 U.S.C. §2703(7)(a)(i) that tribes have *maximum flexibility* to utilize games such as bingo and lotto for tribal economic development . . . *The Committee specifically rejects any inference that tribes should restrict class II games to existing game sizes, levels of participation, or current technology* . . . The Committee intends that tribes be given the opportunity of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility," emphasis added).

[6] *I.e.* slot machines and equivalent machines or devices which the IGRA denotes as electronic or electromechanical facsimiles in which one player can play a game with or against a machine or device. 25 U.S.C. §2703(7)(B)(ii).

[7] *Cf.* 25 U.S.C. §2710(d)(1)(C) and §2710(d)(7)(B)(vii). The IGRA must be read against the backdrop of the basic rules of federal Indian law. These basic rules include: (1) Indian tribes are sovereign, self-governing entities whose governing powers are inherent, predating the adoption of the United States Constitution; (2) Congress under the Constitution (Article I, Section 8) has plenary power over Indian Affairs although that power is limited by the trust responsibility; (3) the powers of self-government of an Indian tribe are not changed or abrogated, except if at all by express or clear language in an Act of Congress; (4) neither the federal government nor a state government has jurisdiction to regulate the conduct of Indian tribes or individual Indians in Indian country unless if at all an Act of Congress has conferred such jurisdiction; and, (5) the canons of construction of Federal statutes affecting Indian affairs require a broad construction when Indian rights are preserved or established, and a narrow construction when Indian rights are to be abrogated or limited. The Proposed Rule is contrary to the established basic rules of Federal Indian law.

[8] A clear and specific expression of Congressional intent is required to intrude on tribal sovereignty. Absent such clear and specific intent, tribal sovereignty will not be curtailed. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976). Thus, for example, "[i]n *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court sharply limited the power of the states to apply their gambling laws to Indian gaming . . . An essential element of its decision was that *Congress had not acted specifically* to make state gambling laws applicable in Indian country." *Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 472 (6th Cir. 1998) (emphasis added), *cert. denied*, 525 U.S. 929 (1998); *see also Cohen's Handbook of Federal Indian Law*, §2.01[1] (2005 ed.) ("Congress's primacy over the other branches of the federal government with respect to Indian law and policy is rooted in the text and structure of the Constitution . . . Congress' constitutionally prescribed primacy in Indian affairs with respect to assertions of power by the *executive* branch is reflected in countless court decisions requiring federal agencies . . . to conform to congressionally determined Indian policy," *citing United States v. Lara*, 541 U.S. 193 (2004) and *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-89 (1999), emphasis in original). Federal power, however, to regulate Indian affairs is not absolute. *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935) ("[T]his power [is] not absolute . . . While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations . . . and to pertinent constitutional restrictions").

Proposed Rule or in the Technical Standards Regulations.[9] Tribal governments and the Commission are not co-equal regulators of tribal gaming as implied by the Commission in the Proposed Regulations.

As to all areas touched by the IGRA, namely the regulation and operation of gaming by tribal governments, tribal rights to self-government were recognized and protected by the Congress.[10] Involvement by outside, non-tribal governmental entities was minimized to the full extent possible.[11] That was the deal that was expressed by Congress in the IGRA – a broad allowance for games *and* for technology for class II gaming, with minimal interference by non-tribal agencies including the Commission. The understanding was clearly expressed in the IGRA and to the extent unclear any ambiguity is resolved by the legislative history for the IGRA.

In the almost eighteen years since the enactment of the IGRA, the Commission has already twice adopted definitional regulations, first in 1992, and again in 2002. The federal courts have on several occasions addressed and recognized the distinctions provided by Congress in the IGRA between class II bingo-related games and class III lottery games and also between class II technologic aids and class III facsimiles and slot machines. The federal courts have also recognized that the IGRA is clear and unambiguous as to its meaning as to what constitutes class II bingo gaming and as to what constitutes a class III facsimile – in other words, the very subject matter that the Commission now seeks to change in the Proposed Rule.

Since the enactment of the IGRA in 1988, tribal governments have attempted to follow the rules (*i.e.*, the deal) set by Congress. Tribes, in reliance of those rules, court decisions, and prior actions of the Commission, have invested substantial time, energy, and money, into the development of games and technology legal for play under the IGRA as class II gaming. Tribes have further invested substantial time, energy, and money into the negotiation of compacts with states for class III gaming but have increasingly found unwilling negotiating partners in various states within which those tribes are located.

The Proposed Regulations threaten the longevity of tribal gaming and its productivity as a source of tribal governmental revenues. The Proposed Regulations violate the basic purposes of the

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[9] *See, e.g.*, Classification Regulations, *supra*, at 30238. Statements to the contrary as to the NIGC's regulatory authority in prior court decisions discussing other aspects of the statutory scheme created by the IGRA are dicta.

[10] *Compare* 25 U.S.C. §2701(4) and (5) (describing findings of Congress as including "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government" and "*Indian tribes have the exclusive right to regulate gaming activity on Indian lands* . . .," emphasis added), *and* 25 U.S.C. §2702(1)-(3) (declaring purposes of the IGRA as including "to provide a statutory basis for the *operation of gaming by Indian tribes* as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," "to provide a statutory basis for the *regulation of gaming by an Indian tribe* adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players," and "to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue," emphasis added).

[11] See nn. 18 to 94 *infra* and accompanying discussion regarding the express wording, structure, and the legislative history of the IGRA.

IGRA. Basic notions of equity and fair play are threatened by the Proposed Regulations which seek (1) to change the rules late in the day as to what constitutes class II gaming; and, (2) to take away currently legitimate class II games (reducing the scope of class II gaming and thereby effectively enlarging the scope of class III gaming requiring a compact or procedures), and yet (3) leave tribal governments with no judicial remedy against states, and a difficult path to Secretarial procedures, by which to obtain class III gaming if the states in which the tribes are located fail to negotiate for a compact in good faith as required by the IGRA.[12]

Taken at a high-level view, the Proposed Regulations appear to attempt to accomplish the following tasks: (a) limit all class II gaming played with technology to essentially only one game design which the Commission has defined in an arbitrarily restrictive manner through the Proposed Rule, (b) thereby restrict the ability of tribal governments to offer all games and technology that Congress recognized for tribes as class II gaming under the IGRA, (c) limit technology used with class II gaming through the Proposed Rule (while at the same time eliminating the ability of tribal governments to use class II technology through the Commission's separately proposed Technical Standards Regulations), and, (d) regulate through the Commission all aspects, down to the finest details, of tribal class II gaming played with technology. The current approach evidenced in the Proposed Regulations is contrary to the express wording of the IGRA, the structure of the IGRA, the legislative history of the IGRA, and binding judicial precedent. The current approach also construes prior judicial precedent in ways inconsistent with that judicial precedent. The current approach is also contrary to prior Commission precedent on which tribes and the class II gaming industry have relied. The Commission has not demonstrated adequate justification to reverse its prior positions on class II gaming.

The Commission's recent statements that tribal governments, if they so choose, remain free to adopt regulations in addition to those contained in the Proposed Regulations is not a recognition of the jurisdiction of tribal governments. The Proposed Regulations are so restrictive and comprehensive that it is unlikely that tribal governments will adopt additional requirements. Essentially, the Commission attempts through the Proposed Regulations to occupy the entire regulatory space, even though that regulatory space remained with tribal governments under the IGRA.

The Commission seeks through the Proposed Regulations to impose unlawful extra-statutory pre-conditions to the right of tribes to engage in gaming. The Commission's basic approach in the Proposed Regulations of seeking to impose a detailed description of class II gaming or technology

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[12] Congress also intended in the IGRA that tribal governments would have the opportunity to engage in class III gaming. *Cf.* 25 U.S.C. 2710(d) (creating obligation of good faith negotiations by states for class III gaming compacts and a right of action by tribal governments in federal court if a state fails to negotiate in good faith); Senate Report, *supra*, at 3083 ("It is the Committee's intent that the compact requirement for class III gaming not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes"). The Supreme Court subsequently invalidated the Congressionally created remedy in the IGRA of an action in federal court by a tribe when a state refuses to negotiate in good faith for a compact for class III gaming. *Seminole Tribe of Florida v. State of Florida*, 517 U.S. 44 (1996). So even as to the deal expressed by Congress in the IGRA, the relationship turned out not as it originally appeared to tribal governments.

followed by mandatory certifications of all class II gaming as meeting the Commission's unauthorized extra-statutory view of class II gaming is essentially the same improper approach that the Commission considered *but* wisely abandoned in connection with its 1999 proposed game classification rule.[13] The Commission does not have the authority to "pre-approve" games or related technology before those games are offered by tribal governments and doing so would violate the jurisdiction of tribal governments and their agencies. Doing so would also violate the IGRA.

The Proposed Regulations appear to provide an unfair advantage to a few gaming vendors who are anticipated to provide only a few games; this outcome serves no legitimate public purpose and violates Congress' intent that the IGRA be for the benefit of tribes. Important trust responsibilities are implicated (violated) by the Proposed Regulations.

The Commission's current rulemaking initiatives have created an environment of uncertainty making it difficult for our tribal agencies to determine what new games should or can be implemented in our gaming facility as class II gaming. The Proposed Regulations have also created an environment of uncertainty between tribes and states as to the regulatory framework intended by Congress. That uncertainty will not be remedied by moving forward with the Proposed Regulations. Respectfully, if the Commission seeks to reduce the uncertainty surrounding class II gaming by virtue of the Commission's rulemaking initiatives, the Commission will abandon the Proposed Regulations.

II. Proposed Rule.

A. Overview.

The Proposed Rule is objectionable for many reasons including without limitation: (a) the Proposed Rule violates the inherent sovereignty retained by the Miccosukee Tribe of Indians of Florida and other tribal governments; (b) the Proposed Rule represents an unsupportable assertion of authority by the Commission contrary to the Commission's authority as delegated by Congress under the IGRA and the Proposed Rule violates the jurisdiction of tribal agencies, along with state agencies, other federal agencies, and the authority of the Congress; (c) the Proposed Rule violates the IGRA and binding judicial precedent with which the Commission must comply; (d) the Proposed Rule will likely cause substantial uncertainty in the regulation of tribal gaming; (e) inadequate consultation occurred with the Miccosukee Tribe of Indians of Florida,[14] and we

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[13] *See* Proposed Rule on Classification of Games, 64 Fed.Reg. 61234 (November 10, 1999) ("Classification Procedure Regulations"). The NIGC wisely abandoned its Classification Procedure Regulations in 2002. *See* Proposed Rule Withdrawal, 67 Fed.Reg. 46134 (July 12, 2002). Under the NIGC's prior Classification Procedure Regulations, the NIGC sought to pre-approve all games not subject to a tribal-state compact and any modifications to such games. Contrary to the NIGC's representation in its notice to the Classification Regulations, the effect and substance of the current Proposed Regulations is the precisely same as the previously abandoned Classification Procedure Regulations.

[14] See nn. 172 to 183 and accompanying discussion.

suspect other tribal governments,[15] including as to the need and purpose of the Proposed Rule; (f) the Commission came to the consultation table with a pre-conceived rule;[16] and, (g) the Commission failed to consider viable and less burdensome alternatives to the Proposed Rule.[17] In connection with the Commission's purported consultation, the Advisory Committee established by the Commission in connection with its drafting efforts as to the Proposed Rule and the interrelated Technical Standards Regulations violated federal laws.

B. The Commission is an Agency of Limited Authority and Lacks the Authority to Promulgate or to Enforce the Proposed Rule.

The IGRA must be read in the context under which the statute was enacted, which we discuss below, and in the context of federal Indian law.[18] Prior to the enactment of the IGRA, states had attempted to enforce their gaming laws with respect to tribal government gaming on tribal lands. These efforts had uniformly been rejected by the courts[19] culminating in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Supreme Court in *Cabazon Band* held that, where state law permitted and regulated gaming activity under its laws, Indian tribes as a matter of tribal sovereignty and federal Indian law could engage in, or license and regulate, such activity free from state jurisdiction or regulation.

Similarly, prior to the enactment of the IGRA, federal law permitted the involvement of the federal government in tribal gaming in only limited respects. The Johnson Act prohibited the use or possession of slot machines or gambling devices in Indian country.[20] Section 81 of Title 25 of the

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[15] Each tribal government is separate, distinct, and has unique rights. We do not purport through these comments to speak for other tribal governments.

[16] *Id.*

[17] *See* n. 184 and accompanying discussion.

[18] Tribal sovereignty serves as "a backdrop against which the applicable . . . federal statutes must be read." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 172 (1973); *see also Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-24 (1993) (same); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent authority over their members and territories," *quoting Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (recognizing tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 216-17 (1987) (the Supreme Court "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *quoting United States v. Mazurie*, 419 U.S. 544, 557 (1975), and the review must "proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *quoting, New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983)); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 178 (1980) (where congressional intent is not "readily apparent . . . the tradition of Indian sovereignty" may serve "[a]s a guide to ascertaining that intent").

[19] *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) (bingo falling within a category of gaming that the state has chosen to regulate and tribal bingo therefore not subject to state law), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group of Capitan Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) (state laws as to bingo civil-regulatory and not applicable to tribal bingo game), *cert. denied*, 461 U.S. 929 (1983); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Williquette*, 629 F. Supp. 689 (W.D. Wis. 1986) (Wisconsin raffle laws, which were deemed civil-regulatory and construed to include pull tab gaming, not applicable to tribal gaming); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F.Supp. 712 (W.D. Wis. 1981) (Wisconsin bingo laws deemed civil-regulatory and not applicable to tribal gaming).

[20] The Johnson Act, however, is not a law permitting federal regulation of Indian gaming. The Johnson Act is a criminal law applicable to slot machines and certain gambling devices. *See* 15 U.S.C. §§1171-1178.

United States Code, required the approval of the Secretary of the Interior for certain kinds of tribal contracts touching tribal lands or claims.[21] Prior to the IGRA, existing law did not provide a basis for federal regulation of tribal gaming.[22]

Several years of debate over Indian gaming occurred in the Congress prior to the passage of the IGRA.[23] Although some have posited that the IGRA was enacted by Congress in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, various members of Congress had explored legislation intended to protect tribal gaming from incursion or control by outside non-tribal interests over several years of debate prior to the enactment of the IGRA.[24] In any event, after the Supreme Court in the *Cabazon* decision firmly fixed the right of Indian tribes with respect to gambling activities on their lands, the Congress in the 100th Congress proposed legislation in the form of Senate Bill 555 ("S. 555") which was ultimately enacted as the IGRA.[25]

The primary purpose of the IGRA was to benefit tribes, whose rights were to be preserved consistent with the rest of the IGRA.[26] To protect tribal rights to gaming against arguments of state jurisdiction over or the application of state laws relating to tribal gaming, the IGRA created a comprehensive regulatory framework for tribal gaming intended to preempt state laws relating to gaming.[27]

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[21] The only Indian gaming use of the Section 81 authority, in the pre-IGRA era, was the approval of gaming management contracts entered into by tribes. Section 81 was a law for the protection of tribes and did not give the Secretary any power to regulate otherwise legal gaming on the reservation. Under the IGRA, Secretarial authority for management contracts has been transferred to the NIGC. *See* 25 U.S.C. 2711(h).

[22] 25 U.S.C. §2701(3) ("existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands").

[23] *See* F. Ducheneaux & P.S. Taylor, *Tribal Sovereignty and the Powers of the National Indian Gaming Commission* (referred as the "Tribal Sovereignty Paper") (the paper (a) discusses at length, from the experiences of persons involved in the consideration and drafting of legislation involving tribal gaming, the legislative intent behind the IGRA, and, (b) reviews the history of prior proceedings and proposed legislation considered by the Congress in connection with tribal gaming). We have borrowed, and in the instance of economy paraphrased, from the Tribal Sovereignty Paper in connection with our comments and credit should be given to the authors. Our apologies for any errors.

[24] A review of the various legislative proposals considered by Congress prior to the final enactment of the IGRA reveals that each attempt to recognize extensive regulatory authority in the states or in the federal government over class II gaming was rejected by the Congress. Tribal Sovereignty Paper, *supra*.

[25] Final agreement was apparently reached in the Senate on S. 555 in late April 1988. Tribal Sovereignty Paper, *supra*. On May 13th, the Senate Indian Affairs Committee took up consideration of S. 555. *Id.* It adopted an amendment in the nature of a substitute that was the text of the compromise and ordered the bill reported favorably, as amended, to the Senate. *Id.* On August 3rd, just prior to the adjournment of the Congress for the Labor Day recess, the Committee filed the Senate Report on S. 555. *Id.* On September 15th, the Senate passed S. 555, as amended, by voice vote. *Id.* S. 555, as passed by the Senate, was received in the House on September 22nd. *Id.* The House debate on S. 555, under suspension of the rules, was completed on September 26th. *Id.* On September 27th, the bill passed on a roll call vote of 323 ayes and 84 noes. *Id.* The bill that became the IGRA was signed into law by the President on October 17, 1988. *Id.*

[26] *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 974 (2004); *see* 25 U.S.C. §2702(1) and (2) (providing purposes of the IGRA as "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players").

[27] Courts have remarked on the IGRA's comprehensive nature. *See, e.g., Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1994), *cert. denied*, 516 U.S. 912 (1995); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F.Supp. 645, 648 (D. Wis. 1990) (describing the IGRA as "establish[ing] a comprehensive scheme for the regulation of gaming on Indian lands"). The comprehensive treatment of tribal gaming in the IGRA gives rise to a complete preemptive effect as to state laws. *Gaming Corporation of America v. Dorsey &*

A secondary purpose of the Act was to provide for "federal standards" under which *tribal governments* would conduct and regulate such gaming. The "federal standards" are contained in the IGRA and represent, to the extent such standards are allowable, a limitation by Congress of pre-existing tribal rights. As discussed below, the "federal standards" for tribal gaming are those statutory standards established by the express terms of the IGRA, *i.e.*, the statutory requirement that all tribal gaming be conducted under tribal gaming ordinances, that tribal gaming ordinances satisfy the enumerated statutory requirements, that tribal governments license primary management officials and key employees according to the statutory requirements as to suitability, that contracts with non-tribal entities for the operation or management of tribal gaming activities meet the statutory requirements as to suitability (for class II gaming) and key contract terms including contract length and compensation, and the appropriate subject matter for tribal-state compacts for class III gaming.

Lastly, Congress through the IGRA balanced the competing interests of tribal governments, the states, and the federal government, in the regulation of gaming on Indian lands. Under the IGRA, Congress recognized three classes of gaming on Indian lands: class I gaming (social gaming played for prizes of nominal value and ceremonial gaming); class II gaming (bingo, related games and technology, and certain non-banked card games); and, class III gaming (all gaming that is neither class I nor class II gaming).[28] Congress subjected each class of gaming to a different

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Whitney, 88 F.3d 536, 544 (8th Cir. 1996) ("Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law . . . There is a comprehensive treatment of issues affecting the regulation of Indian gaming," and the Senate Report for the IGRA "demonstrates the intent of Congress that IGRA have extraordinary preemptive power, both because of its broad language and because it demonstrates that Congress foresaw that it would be federal courts which made determinations about gaming"); *Senate Report*, *supra*, at 3076 ("S.555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands . . . Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed").

[28] Congress provided the following clear, express definitions for the three classes of gaming:

> For purposes of this chapter -
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> * * *
>
> (6) The term 'class I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.
>
> (7) (A) The term 'class II gaming' means -
>
> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and
>
> (ii) card games that . . .
>
> * * *
>
> (B) The term 'class II gaming' does not include -
>
> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
>
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.
>
> * * *
>
> (8) The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming.

regulatory scheme with Congress providing under the express terms of the IGRA the respective roles to be played by tribal governments, the states, and the federal government (and as to the federal government assigning different roles to the Secretary,[29] the Commission, and the Department of Justice), for each class of gaming.[30]

Importantly, the Congress recognized in the IGRA instances under which tribal governments would self-regulate their gaming activities, whether class II or class III gaming, and under which such self-regulation would be without significant involvement by non-tribal entities.[31] The provision for such self-regulation, by statute as to class II gaming, and by negotiation through a tribal-state compact or by Secretarial procedures, for class III gaming, was and is consistent with the Congress' stated purpose in the IGRA of "promoting . . . self sufficiency, and strong tribal governments."[32] The provision for self-regulation by tribal governments is consistent with the

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25 U.S.C. §2703. The games of pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo are referred to in these comments as the "Sub-games" to bingo because of the requirement in the IGRA that the Sub-games be played at the same location as bingo to constitute class II gaming.

[29] The term "Secretary" as used in these comments refers to the Secretary for the United States Department of the Interior, or the Secretary's designee.

[30] *Seminole Tribe, supra*, 517 U.S. 44; 25 U.S.C. §2710.

The IGRA commits the regulation of class I gaming entirely to tribal governments. See 25 U.S.C. §2703(6) and §2710(a) ("Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter"). Class I gaming is not discussed within these comments except as noted.

As discussed in these comments, and as provided in the IGRA and recognized by the courts, class II gaming was made subject to the primary regulation by tribes with *oversight* as provided in the IGRA by the NIGC. *Seminole Tribe, supra*, 517 U.S. 44, 48, n. 1 ("Regulation of class II gaming contemplates a federal role, but places primary emphasis on tribal self-regulation"); *Coeur d'Alene Tribe, et. al v. State of Idaho*, 842 F.Supp. 1268, 1273 (D. Idaho 1994) ("Indian tribes have jurisdiction over class II gaming, subject to the requirements of IGRA and the oversight of the National Indian Gaming Commission"), *aff'd.*, 51 F.3d 876 (9th Cir. 1995), *cert. denied*, 516 U.S. 916; 25 U.S.C. §§2703(7) and 2710(b);.

In turn, regulation of class III gaming, which includes slot machines (and their functional equivalents, "facsimiles"), lotteries similar to the games offered by state lotteries, and casino gaming, was made subject to good faith negotiations between tribal governments and states in the form of tribal-state compacts for class III gaming, or through procedures approved by the Secretary, with the NIGC having a minimal role (essentially none). *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 726 (9th Cir. 2003) (explaining that Congress "devised the Tribal-State compacting process as a means to resolve the most contentiously debated issue in the legislation: which authority – Tribal, State, or Federal – would regulate class III gaming"), *cert. denied*, 125 S.Ct. 51; *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) ("[T]he tribal-state compact is the exclusive method of regulating class III gaming"), *cert. denied*, 513 U.S. 919; *see also Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 634 (D.C. Cir. 1994) ("The Commission's principal responsibilities relate to what [IGRA] designates as 'class II gaming'"), *cert. denied*, 512 U.S. 1221 (1994); *United States v. 1020 Electronic Gambling Machines*, 38 F.Supp.2d 1213, 1216 (E.D. Wash. 1998) ("The [NIGC] does have significant powers . . . However, it regulates class II gaming, whereas this case involves class III gaming"); 25 U.S.C. §2703(7) and (8) and §2710 (d); Senate Report, at 3079-3080 ("Section 2703 (7)(B) specifically excludes from class II, and thus from regulation by . . . the National Indian Gaming Commission, so-called banking card games and slot machines . . . The Committee's intent in this instance is to acknowledge the important difference in regulation that such games and machines require and to acknowledge that a tribal-State compact for regulation of such games is preferable to Commission regulation").

[31] *See* 25 U.S.C. §2710(c) (providing for certificates of self-regulation for class II gaming and providing that following certification that such self-regulated class II gaming activities are subject to reduced oversight by the NIGC); 25 U.S.C. §2710(d)(5) ("Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe"); Senate Report, *supra*, at 3084 ("The use of state regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of class III gaming – many can and will"); 134 Cong.Rec. at S12651 (daily ed. September 15, 1988) ("Some tribes can assume more responsibility than others and it is entirely conceivable that a state may want to defer to a tribal regulatory system and maintain only an oversight one").

[32] 25 U.S.C. §2702(1).

intent of the IGRA, as expressed in the various provisions of the IGRA, of protecting tribal interests as to tribal gaming while providing for only minimal intrusion by non-tribal governmental entities including by the Commission.

The IGRA also created the Commission.[33] The powers of the Commission are as established in the IGRA. As discussed below, the Commission's role under the IGRA is primarily one of oversight to see that a tribal government implements the "federal standards" set out in the tribe's gaming ordinance. The Commission was given other certain limited powers for class II gaming such as management contract review and approval, establishment of fees and assessment of fines, granting of certificates of self-regulation, *etc.*, and there is no question that the Commission has a "regulatory role" with respect to class II gaming.

The question of the meaning and nature of the Commission's "regulatory role" for class II gaming is a question of degree. Fortunately, there is no ambiguity and the question as to the degree of regulatory authority provided for the Commission was answered by Congress in the IGRA. As a review of the language, structure, purpose, and legislative history of the IGRA makes clear,[34] the role of the Commission is not one of altering the jurisdictional framework in the IGRA by altering the statutory definitions of class II gaming, or one of developing and imposing detailed regulations on Indian gaming as provided in the Proposed Rule *in lieu* of tribal government decisions on the regulation of such gaming, but one of limited "oversight" of each tribal government's own regulatory efforts under its tribal gaming ordinance and the provisions contained in the IGRA. Respectfully, the Commission can implement the IGRA, but the Commission cannot change the IGRA as the Commission would do with the Proposed Rule.

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[33] 25 U.S.C. §2704.

[34] A court reviewing the action of an agency "shall determine all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706. The reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The court will abide by the agency's factual findings if they are "supported by substantial evidence" and affirm the agency's orders so long as there is a rational connection between the facts found and the choices made. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004).

When a court reviews an agency's interpretation of a statute, the court turns to a two-step analysis. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step is determining whether Congress has spoken directly to the "precise question at issue," for if it has, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If however, the statute is silent or ambiguous on the specific issue, "the question for the court is whether the agency's answer is based upon a permissible construction of the statute." *Id.* at 843. When the agency's construction of a statute is challenged, its "interpretation need not be the best or most natural one by grammatical or other standards . . . Rather [it] need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (citations omitted).

As indicated, the first step of the *Chevron* test requires the Court to determine whether Congress "has directly spoken to the precise question at issue." *Chevron, supra*, 467 U.S. at 842. At this stage of the analysis, the Court employs the "traditional tools of statutory construction, including examination of the statute's text, structure, purpose, and legislative history." *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 105 (D.C.Cir.2005) (quotation omitted). "When Congress has spoken, we are bound by that pronouncement and that ends this Court's inquiry." *National Treasury Employees Union v. Federal Labor Relations Auth.*, 392 F.3d 498, 500 (D.C. Cir. 2004); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (where the will of Congress is clear, the "inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress," *quoting Chevron, supra*, 467 U.S. at 843). Only when "Congress's intent is ambiguous" does the Court proceed to the second step of the inquiry, and consider "whether the agency's interpretation is based on a permissible construction of the statute." *New York v. U.S. Envtl. Prot. Agency*, 413 F.3d 3, 17 (D.C. Cir. 2005) (quotation omitted).

1. The Commission Lacks the Authority to Change the Jurisdictional Framework in the IGRA.

Put simply, the Proposed Rule seeks to change the definitions provided by Congress for class II gaming. The Proposed Rule would improperly: (a) provide extra-statutory definitions for the game of bingo; (b) impose extra-statutory definitional limitations on the game of bingo merely if played with technology; (c) provide definitional limitations on games similar to bingo in a manner inconsistent with Congressional intent in the IGRA; (d) impose definitional limitations on games similar to bingo merely if played with technology; and, (e) impose arbitrary definitional distinctions for games of pull-tabs and instant bingo inconsistent with games such as lotto and games similar to bingo even though all such games, *i.e.*, the Sub-games to bingo, are class II gaming merely if played at the same location as bingo.[35]

Congress went to great lengths in the IGRA to create a comprehensive regulatory framework for tribal gaming by class of gaming. The definitions of class II gaming are the cornerstone of the jurisdictional and regulatory framework established by Congress in the IGRA for tribal gaming. Congress, having provided a detailed definition of bingo, clearly knew how to define bingo gaming and if Congress had intended a different or additional set of definitions to apply if technology was used Congress would have provided those additional definitions in the statute. Only Congress, and plainly not the Commission, has the authority to alter the jurisdictional framework for tribal gaming.

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[35] Under the Proposed Rule, bingo is no longer the type of game defined under the IGRA but if played with technology is defined *inter alia* under the Proposed Rule as using a specified number of objects of specified characteristics, cards of specified characteristics, patterns of specified characteristics, prizes of specified characteristics, a rate of play of specified characteristics, and a specified method of play including but not limited to house "sleep" and covering rules. *Compare* 25 U.S.C. §2703 (7)(A), *with* Definition Regulations, *supra*, 71 Fed. Reg. 30232 (proposed §502.8), *and*, Classification Regulations, *supra*, 71 Fed. Reg. 30238 (proposed §§502.8 and 502.9 and proposed part 546). As to bingo, the IGRA provides a clear definition of the game and makes no distinction as to the definition of bingo "whether or not electronic, computer, or other technologic aids are used in connection therewith." 25 U.S.C. §2703(7)(A)(i). Under the Proposed Rule, the category of games similar to bingo is no longer the catch-all category specified and intended under the IGRA but if played with technology is defined *inter alia* under the Proposed Rule as using a specified number of objects of specified characteristics, cards of specified characteristics, patterns of specified characteristics, prizes of specified characteristics, a rate of play of specified characteristics, and a specified method of play including but not limited to house "sleep, and covering rules. *Compare* 25 U.S.C. §2703 (7)(A) and (B), *with* Definition Regulations, *supra*, 71 Fed. Reg. 30232 (proposed §502.8), *and*, Classification Regulations, *supra*, 71 Fed. Reg. 30238 (proposed §§502.8 and 502.9 and part 546). Under the Proposed Rule, the games of pull-tabs and instant bingo if played with technology are treated as the same game even though enumerated under the IGRA as distinct games. *Compare* 25 U.S.C. §2703 (7)(A)(i)(III), *with* Classification Regulations, *supra*, 71 Fed. Reg. 30238 (proposed §§502.8 and 502.9 and proposed part 546). Under the Proposed Rule, the games of pull-tabs and instant bingo are apparently treated differently for purposes of technology than lotto and games similar to bingo even though all of the Sub-games to bingo are treated the same under the IGRA as being within the class of games of class II bingo merely if "played in the same location." *Compare* 25 U.S.C. §2703 (7)(A)(i)(III), *with* Definition Regulations, *supra*, 71 Fed. Reg. 30232 (proposed §502.8), *and*, Classification Regulations, *supra*, 71 Fed. Reg. 30238 (proposed §§502.8 and 502.9 and proposed part 546). Additionally, the IGRA removes from class II gaming *machines or devices* that are functionally equivalent to slot machines (*i.e.*, machines or devices in which one player plays a game with or against a machine or device as compared to with or against other players) but the IGRA makes no distinction as to *the medium used in the cards* for any class II game (whether for bingo or the Sub-games to bingo). 25 U.S.C. §2703(7)(B)(ii). The carve-out from class II gaming is not as to the "medium" of the cards used for class II games but for certain machines or devices. *Id.* Nonetheless, the Proposed Rule attempts to apply a distinction as to the medium used for the cards in the Sub-games of pull-tabs and instant bingo as compared to lotto and games similar to bingo even though all of these games appear in the same statutory provision of the IGRA, in fact right next to each other in a list of enumerated games, without distinction and without any requirement for treatment as class II gaming other than the location requirement. *Compare* 25 U.S.C. §2703 (7)(A) and (B), *with* Definition Regulations, *supra*, 71 Fed. Reg. 30232 (proposed §502.8), *and*, Classification Regulations, *supra*, 71 Fed. Reg. 30238 (proposed §§502.8 and 502.9 and proposed part 546).

a. The IGRA Does Not Grant the Commission the Authority to Change the Jurisdictional Framework in the IGRA by Changing the Definitions of Class II Gaming.

The IGRA provides a detailed and meaningful definition of class II gaming.[36] Nonetheless, the Commission has come with the Proposed Rule and seeks to impose additional detailed and limiting extra-statutory definitions of class II gaming. In other words, the Commission through the Proposed Rule seeks to change the definitions, and intentionally or not the jurisdictional framework, in the IGRA.

The IGRA contains no express grant of authority to the Commission to re-write the definitions and the jurisdictional framework established by Congress in the IGRA.[37] The fact that Congress did not expressly negate the authority of the Commission to re-write the statutory definitions of gaming and the related jurisdictional framework does not create an ambiguity in the statute allowing the Commission to move forward with the Proposed Rule.[38] An agency has no power to act "unless and until Congress confers power upon it."[39] *The power apparently claimed by the Commission in the Proposed Rule* to change the statutory definitions of, and the jurisdictional framework for, tribal gaming *is further contradicted by the express wording of the IGRA.*

Under the IGRA, Congress found that tribal governments "*have the exclusive right to regulate gaming activity* on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming."[40] Congress provided through the IGRA a "statutory basis for the *operation of gaming by Indian tribes*" and a "statutory basis for the *regulation of gaming by an Indian tribe.*"[41] The IGRA is premised on a strong foundation and presumption of primary tribal operation and regulation of tribal gaming activities.

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[36] 25 U.S.C. §2703(7).

[37] The starting point for the interpretation of a statute is "the language of the statute itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985); *see American Bankers Ass'n v. National Credit Union Admin.*, 271 F.3d 262, 267 (D.C.Cir.2001) ("*Chevron* step one analysis begins with the statute's text."); *Southern California Edison Co. v. FERC*, 195 F.3d 17, 22 (D.C.Cir.1999) ("Of course, the starting point, and the most traditional tool of statutory construction, is to read the text itself.").

[38] The mere failure of Congress to spell out on the fact of a statute that an agency lacks a certain power cannot alone supply the ambiguity that would permit the agency to exercise that power under *Chevron*. As the Court of Appeals for the District of Columbia has explained:

> [T]o suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power ... is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent. Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

Oil, Chem. & Atomic Workers, Int'l Union AFL-CIO v. NLRB, 46 F.3d 82, 90 (D.C.Cir.1995) (emphasis in original).

[39] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

[40] 25 U.S.C. §2701(5) (emphasis added).

[41] 25 U.S.C. §2702 (1) and (2) (emphasis added); 25 U.S.C. §2713(d) (provides that "Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not

"Any class II gaming on Indian lands shall continue to be *within the jurisdiction of the Indian tribes*, but shall be subject to the provisions of this chapter."[42] Further, "*An Indian tribe may engage in, or license and regulate, class II gaming* on Indian lands within such tribe's jurisdiction, if – (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise prohibited on Indian lands by Federal law),[43] and (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman [of the NIGC]." The IGRA's requirement that all tribal gaming be conducted under an approved *tribal gaming ordinance* or resolution meeting certain statutory requirements includes the primary "federal standards" imposed on tribal gaming under the IGRA.[44] Additionally, "A separate license issued *by the Indian tribe* shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted."[45]

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inconsistent with this chapter or with any rules or regulations adopted by the Commission"); 25 U.S.C. §2710(d)(5) ("Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe . . . that is in effect"). Of course, the NIGC's regulations must be authorized by the IGRA to require compliance by a tribal government.

[42] 25 U.S.C. §2710(a)(2) (emphasis added).

[43] Senate Report, *supra*, at 3082 ("The phrase 'not otherwise prohibited by Federal Law' refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175 . . . That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto . . . It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands . . . The Committee specifically notes the following sections in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303-1307, 1952-1955 and 1961-1968; 39 U.S.C. 3005; and except as noted above . . . 15 U.S.C. 1171-1178").

[44] 25 U.S.C. §2710(b)(1)(A) and (B). The IGRA requires the Chairman of the NIGC to approve a tribal gaming ordinance if the ordinance satisfies the *standards* imposed by Congress in the IGRA. 25 U.S.C. §2710(b)(2) (provides that the "Chairman shall approve" and includes among the requirements for tribal gaming ordinances provisions that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity," "net revenues from any tribal gaming are not to be used for purposes" other than those specified in the statute, "annual outside audits, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission," "all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming will be subject to such independent audits, "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety," "there is an adequate system which – . . . ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and . . . includes . . . tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses . . . a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment . . . and . . . notification by the Indian tribe to the Commission of the results of such background check before the issuance of any such licensees," and "Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if . . . the Indian tribe has prepared a plan to allocate revenues to uses authorized . . . [and] the plan is approved by the Secretary as adequate . . .").

The requirement of tribal gaming ordinances under the IGRA was not intended to act as a bar, or pre-condition, to the right of a tribal government to engage in, and to regulate, tribal gaming. *See* 25 U.S.C. §2710(e) (provides that "For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if its meets the requirements of this section . . . Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent that such ordinance or resolution is consistent with the provisions of this chapter"); *see also* 25 U.S.C. §2714 ("Decisions made by the Commission pursuant to sections 2710 . . . of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5").

[45] 25 U.S.C. §2710(b) (emphasis added).

As to class III gaming, such activities apparently "shall be lawful on Indian lands only if such activities are . . . (A) authorized by an ordinance or resolution that . . . is adopted by the governing body *of the Indian tribe* . . . (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and, (C) conducted in conformance with a Tribal-State compact entered into *by the Indian tribe* and the State . . . that is in effect."[46] Upon request *of a tribe*, "having jurisdiction over the Indian lands upon *which a class III gaming activity* is being conducted, or is to be conducted," "a State shall negotiate with the Indian tribe in good faith to enter into such a compact."[47] The Congress in the IGRA also imposed statutory "federal standards" for the potential content and subject matter of tribal-state compacts for class III gaming.[48]

Under the IGRA, states have essentially no role with respect to class II gaming.[49] Essentially the only role for states with respect to tribal gaming is through the opportunity provided in the IGRA for a state to engage in good faith negotiations with a tribal government for a tribal-state gaming compact for class III gaming.

The federal government's role as to the regulation of tribal gaming is divided across several agencies. Although the Commission, as discussed below, has significant powers under the IGRA for the oversight regulation of tribal gaming those powers are not absolute and do not extend to all areas of the regulation of tribal gaming. The Secretary approves "revenue allocation plans" under which net revenues from gaming activities to make per capita payments to members of an Indian

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[46] 25 U.S.C. §2710(d)(1) (incorporates the requirements for tribal gaming ordinances for class II gaming into the ordinance requirements for class III gaming); *see also* 25 U.S.C. §2710(b) (imposes as a federal standard the requirement that all tribal gaming be conducted under tribal gaming ordinances or resolutions that include certain statutorily imposed standards as to licensing, regulation, and operation of tribal gaming facilities); 25 U.S.C. §2710(d)(2)(B) (requires the Chairman of the NIGC to approve such tribal ordinances meeting the requirements of 25 U.S.C. §2710(b) for class III gaming unless the Chairman determines that the ordinance was not duly adopted or that the tribal governing body was significantly and unduly influenced by a statutorily defined "bad" actor).

[47] 25 U.S.C. §2710(d)(3)(A).

[48] 25 U.S.C. §2710(d)(3)(C) (provides that "Any Tribal-State compact negotiated . . . may include provisions relating to – (i) the application of criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity . . . (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations . . . (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity . . . (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities . . . (v) remedies for breach of contract . . . (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing, and . . . (vii) any other subjects that are directly related to the operation of gaming activities"); 25 U.S.C. §2710(d)(4) (provides that "Except for any assessments that may be agreed to under [25 U.S.C. §2710(d)(3)(C)(iii)], nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe to engage in a class III activity . . . No State may refuse to enter into the negotiations . . . based upon the lack of such authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment").

[49] *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364 (8th Cir. 1990) ("Congress intended that class II gaming be subject to tribal and federal oversight, and that the states' regulatory role be limited to overseeing class III gaming, pursuant to a Tribal-State compact . . . Permitting [a state] to apply its substantive law to the . . . game here, which is properly classified as class II gaming, conflicts with congressional intent"); *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, 951 F.2d 757, 759 (7th Cir. 1991) ("If the games in question are class II gaming activities . . . they may be prohibited by the State, but they cannot be regulated by the State"); *Sycuan Band of Mission Indians v. Roache, supra*, 54 F.3d 535, 539 ("at least insofar as . . . Class II-type gaming . . . the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees").

tribe.[50] The Secretary also must approve any tribal-state compact for class III gaming.[51] Alternatively, should a tribe and a state not be able to conclude negotiations for a compact for class III gaming, the Secretary is authorized to and "shall prescribe, in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction."[52] The Department of Justice has jurisdiction to take enforcement action against gaming not conforming to the requirements of the IGRA.[53] The Department of Justice also prosecutes for theft or embezzlement from tribal gaming facilities operated by or for or licensed by an Indian tribe pursuant to a tribal gaming ordinance approved by the Commission.[54]

Turning to the Commission, the Commission through the Chairman approves tribal gaming ordinances that meet the statutorily required "federal standards" in the IGRA.[55] The Commission also reviews and comments on licenses issued by tribal governments with respect to primary management officials and key employees of tribal gaming facilities who do not meet the "federal standards" provided in the IGRA as to who may appropriately be so licensed.[56]

The Commission, through the Chairman, approves of management contracts under which a tribe has contracted for the operation and management of a class II gaming activity.[57] As to management contracts, the IGRA provides enumerated "federal standards" for the content of such management contracts[58] and for the exclusion of certain individuals from the role operation and

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[50] 25 U.S.C. §2710(b)(3).

[51] 25 U.S.C. §2710(d)(3)(B) ("such compact shall take effect only when notice of approval by the Secretary of the compact has been published by the Secretary in the Federal Register); 25 U.S.C. §2710(d)(8)(A) (authorizes the Secretary "to approve any Tribal State compact entered into between an Indian tribe and a sate governing gaming on Indian lands of such Indian tribe"); 25 U.S.C. §2710(d)(8)(B) (provides that "The Secretary may disapprove a compact . . . only if such compact violates . . . (i) any provision of this chapter . . . (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands . . . or (iii) the trust obligations of the United States to Indians"); 25 U.S.C. §2710(d)(8)(C) (provides that "If the Secretary does not approve or disapprove a compact described . . . before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter"); and, 25 U.S.C. §2710(d)(8)(D) ("The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved").

[52] 25 U.S.C. §2710(d)7)(B)(vii)(II).

[53] 18 U.S.C. §1166(d).

[54] 18 U.S.C. §§1167 and 1168.

[55] 25 U.S.C. §2710(b)(2) and §2710(d)(2)(B).

[56] 25 U.S.C. §2710(c) (provides that "The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license," and, "If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license"). Consistent with the primary regulatory authority of tribal governments under the IGRA, the final licensing decision remains with the tribal government.

[57] 25 U.S.C. §2711.

[58] 25 U.S.C. 2711(b) (the Chairman may approve of a management contract for class II gaming "only if he determines that it provides at least – (1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis; (2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity; (3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs; (4) for an agreed ceiling for the repayment of development and construction costs; (5) for a

management of the tribal gaming facility.[59] The Commission, through the Chairman, also approves of management contracts under which a tribe has contracted for the operation and management of a class III gaming activity although the Commission's review and approval authority is more limited for class III gaming activities than in the case of a management contract for class II gaming.[60]

The Commission has the authority to monitor and inspect class II gaming activities.[61] However, with the exception of review and approval of tribal gaming ordinances and management contracts, the Commission does not have regulatory authority with respect to class III gaming.[62] The Commission also has the authority to issues fines[63] and to close a game[64] based for substantial

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contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and (6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission"); 25 U.S.C. §2711(c) ("The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances . . . Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues" and, "Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe"); and, 25 U.S.C. §2711(e) ("The Chairman shall not approve any contract if the Chairman determines that . . . a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract").

[59] 25 U.S.C. §2711(e) (requires Chairman to disapprove of any contract if the Chairman determines that – (1) any person [having a direct financial interest in, or management responsibility for, such contract] (A) is an elected member of the governing body of the Indian tribe which is the party to the management contract; (B) has been or subsequently is convicted of any felony or gaming offense; (C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2) of this section; or (D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto . . . (2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity . . . (3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter").

[60] 25 U.S.C. §2710(d)(9) (providing that the "Chairman's review and approval of such contract [for class III gaming] shall be governed by the provisions of" only "subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title").

[61] 25 U.S.C. §2706 (b) (provides that the "Commission – (1) shall monitor class II gaming conducted on Indian lands on a continuing basis; (2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted; (3) shall conduct or cause to be conducted such background investigations as may be necessary; (4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter; (5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States; (6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations; (7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes; (8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;
(9) may administer oaths or affirmations to witnesses appearing before the Commission").

[62] *See Colorado River Indian Tribes v. NIGC*, __ F.3d __, 2006 WL 2987912 (D.C. Cir. 2006) ("This leads us back to the opening question – what is the statutory basis empowering the Commission to regulate class III gaming operations? Finding none . . .").

[63] 25 U.S.C. §2713 (a) (provides that "Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title," "The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman," and, "Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this

violation of the IGRA, regulations promulgated by the Commission (but only as such regulations are authorized by the IGRA), or of tribal regulations, ordinances or resolutions.

The Commission has the authority to issue regulations specifically as to its enforcement authority[65] and to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter."[66] The grant of authority to the Commission to generally promulgate regulations and guidelines must be read in the context of and as to the express terms of the IGRA.[67]

Although the Commission does have significant powers as to the review and approval of tribal gaming ordinances, the review and approval of management contracts, the monitoring and inspection of class II gaming activities, and the issuance of fines and closure of games, such powers do not extend to issuing regulations modifying the definitions of class II gaming expressly provided in the IGRA, and therefore, the overall jurisdictional framework in the IGRA. There is no indication through the wording of the IGRA that Congress intended to grant such rulemaking authority to the Commission including as to the Proposed Rule.[68]

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chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine . . . the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission").

[64] 25 U.S.C. §2713 (b) (provides that "The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title" and "Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved . . . Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation").

[65] 25 U.S.C. §2713.

[66] 25 U.S.C. §2706(b)(10).

[67] *Colorado River Indian Tribes v. NIGC*, 383 F.Supp.2d 123 (D.C. Dist. 2005), *aff'd*, __ F.3d __, 2006 WL 2987912 (D.C. Cir. 2006).

[68] Existing court decisions regarding the Commission's prior efforts at definitions regulations are consistent with the conclusion that the Commission can implement the definitions in the IGRA (as to that portion of the IGRA included in chapter 29 of Title 25 of the United States Code) but the Commission may not change the definitions of class II gaming already expressly provided for in the IGRA as the Commission has proposed to do in the Proposed Rule. *See Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 827 F.Supp.26, 33 (D.D.C. 1993) (definition regulations of NIGC not infirm because "In its definition, the Commission included non-exclusive examples of class III gaming, all of which were either listed specifically in the statute (subsections (a)(1) and (b) of the Commission's definition) or enumerated in the accompanying Senate Report (subsections (a)(2), (c), and (d)) . . . Moreover, and most importantly, the definition retains – verbatim - the statutory definition in its opening clause . . . Merely providing clarifying examples explicitly derived from the statute or its legislative history can hardly be termed contrary to law"), *aff'd*, 14 F.3d 633 (D.C. Cir. 1994), *cert. denied*, 512 U.S. 1221 (1994); *Shakopee Mdewakanton Sioux Community v. Hope*, 798 F.Supp. 1399, 1404 (D. Minn. 1992) ("Neither the statute nor its legislative history makes any mention of keno . . . Because the statute is silent on the precise question at hand, the Court must turn to the second part of the *Chevron* analysis and determine whether the agency's answer to the question is based on a permissible construction of the statute"), *aff'd*, 16 F.3d 261 (8th Cir. 1994). One key defect of the Proposed Rule is that the Proposed Rule seeks to change the definitions of bingo, pull tabs, instant bingo, games similar to bingo, and facsimiles, all of which games and devices have already been addressed by the Congress in the IGRA.

b. The Structure of the IGRA Reveals that the Commission Lacks the Authority to Change the Jurisdictional Framework in the IGRA by Changing the Definitions of Class II Gaming.

The rulemaking authority assumed in the Proposed Rule is further contrary to the structure of the IGRA as outlined above. Examination of the IGRA, both its text and structure, reveals that Congress provided a comprehensive treatment of issues affecting the regulation of tribal gaming. "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does no, as a matter of criminal law and public policy, prohibit such gaming activity."[69] The IGRA establishes the "federal standards" for gaming on Indian lands.[70] The IGRA established the Commission to oversee tribal regulation including as to licensing, background checks of key employees, and other facets of gaming. The Commission has input into tribal licensing decisions, and can approve or disapprove management contracts and tribal gaming ordinances subject to the terms of the IGRA. The Commission can also suspend gaming, impose fines, perform its own background checks of individuals, and request the aid of other federal agencies.

"At no point does IGRA give a state the right to make particularized decisions regarding a specific class II gaming operation . . .The statute itself reveals a comprehensive regulatory structure for Indian gaming. The only avenue for significant state involvement is through tribal-state compacts covering class III gaming."[71] Further, "the statute classifies all gaming into three categories and places traditional (class I) gaming entirely beyond the reach of both federal and state regulation . . . States can influence class II gaming on Indian lands within their borders only if they prohibit those games for everyone under all circumstances . . . Short of a complete ban, states have virtually no regulatory role in class II gaming."[72]

The overall structure and the wording of the individual provisions of the Proposed Rule would remove from class II gaming, and thereby from tribal jurisdiction free from state interference, games and technology that Congress classified as class II gaming under the IGRA. Unless authorized by an Act of Congress, the jurisdiction of state governments and application of state laws do not extend to Indian lands.[73] Only Congress, and not the Commission, can alter the

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[69] 25 U.S.C. §2701(5).

[70] 25 U.S.C. §2702(3).

[71] *Gaming Corp. of America v. Dorsey & Whitney, supra*, 88 F.3d 536, 544.

[72] *Id.*, 88 F.3d at 544.

[73] Senate Report, *supra*, at 3075 ("It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands . . . In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands").

jurisdictional framework established by the IGRA through the definition of the various classes of gaming.

Additionally, as to federal interests represented by the IGRA with respect to the regulation of tribal gaming, the express terms of the IGRA provide clear evidence that for class II gaming tribal governments are to play the lead and active role in regulating their gaming activities with the Commission playing only a secondary oversight regulatory role. In fact, only as to the approval of management contracts does the Commission apparently have a veto right.

Such rulemaking authority as assumed by the Commission in the Proposed Rule would directly impinge on the authority and sovereignty of tribal governments for all gaming activities, and on the authority of states, in the negotiation of compacts for class III gaming activities, the approval by the Secretary of compacts for class III gaming compacts, the authority of the Secretary to approve procedures for class III gaming, and the responsibility of the Department of Justice with respect to gaming that does not conform to the requirements of the IGRA. The structure of the IGRA plainly recognizes different roles for different entities (with the IGRA recognizing the primary role of tribal governments but also providing a lesser regulatory role to states and various federal agencies as provided by the express terms of the IGRA) as to the operation and regulation of tribal gaming. The structure of the IGRA is inconsistent with the Commission's assumption of authority, as a single entity within the comprehensive framework and regulatory system fashioned by Congress in the IGRA,[74] seeking through the Proposed Rule to change the definitions in the IGRA and thereby change the jurisdictional framework affecting all of the *other* entities[75] with roles to play under the IGRA.

c. The Legislative History of the IGRA Reveals that the Commission Lacks the Authority to Change the Jurisdictional Framework in the IGRA by Changing the Definitions of Class II Gaming.

Congress undertook to balance, and has already balanced, in the IGRA the respective interests of tribal governments, the federal government, and the various states.[76] As discussed further below,[77]

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[74] *Cf. Bowen v. American Hospital Association*, 476 U.S. 610, 642 n. 30 (1986) (plurality opinion) (Court noting that because of the large number of agencies implementing the statute there was "not the same basis for deference predicated on expertise as we found in . . . *Chevron*"); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (Court noting that "No agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the [statute]").

[75] An agency is owed no deference when the subject matter of the agency's action is not within the authority delegated to the agency by the Congress. *See, e.g., Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019, 1031 (10th Cir. 2003), *cert. denied, Ashcroft v. Seneca-Cayuga Tribe of Oklahoma*, 540 U.S. 1218 (2004); *Murphy Exploration & Prod. Co. v. Dept. of the Interior*, 252 F.3d 473, 478-479 (D.C. Cir. 2001).

[76] In *Cabazon Band of Mission Indians, supra*, 480 U.S. 202, the Supreme Court determined that California could not apply its own laws regulating bingo prize limits and card games to Indian gaming because the relevant interests of the tribes and the federal government outweighed the state's regulatory interest. Congress incorporated the distinction in *Cabazon* between prohibition and regulation but rather than directing the federal courts to perform the balancing of interest between the states on the one side and the tribe and the federal government on the other, Congress conducted the balancing itself by dividing gaming into three separate classes, allowing states to prohibit class II and class III gaming only if those activities were prohibited throughout a state, and required a tribal-state compact for class III gaming. *See* 25 U.S.C. §§2703, 2704, 2705, 2706, 2710, 2711, 2713. 2714(c), and 2719. The Senate Report makes clear Congress' intent in setting up the tripartite scheme and considering state, tribal, and federal interests:

the legislative history of the IGRA demonstrates that in the balancing undertaken by the Congress in the IGRA the Congress did not authorize the Commission to change the definitional framework in the IGRA by changing the definitions of class II gaming. The Proposed Rule is not within the powers authorized by Congress to the Commission.

2. The Commission's Oversight Role Under the IGRA Does Not Include the Authority to Impose Detailed and Pervasive Regulations of the Type Included in the Proposed Rule.

a. The IGRA Does Not Grant the Commission the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Rule.

The IGRA contains no express grant of authority to the Commission to promulgate pervasive regulations as to the regulation and operation of tribal gaming activities. Here too, the fact that Congress did not expressly negate the authority of the Commission does not create an ambiguity in the statute allowing the Commission to move forward with the Proposed Rule.[78] An agency has no power to act "unless and until Congress confers power upon it."[79] *The power apparently claimed by the Commission in the Proposed Rule* to promulgate pervasive regulations for the operation and regulation of tribal gaming activities *is further contradicted by the express wording of the IGRA.* Beyond the Commission's approval authority for tribal gaming ordinances, and its approval authority for management contracts, the bulk of the Commission's authority for class II gaming resides in the monitoring of and enforcement as to the efforts of tribal governments to comply with the provisions of their tribal gaming ordinances and the IGRA. Quite simply, the powers of the Commission under the IGRA of monitoring and enforcement do not equate with an authority, as assumed under the Proposed Rule, of promulgating still additional standards for tribal governments to comply with so as to give the Commission still more to monitor and enforce.[80]

> [I]n the final analysis, *it is the responsibility of the Congress*, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands. S. 555 recognizes primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For class III casino, parimutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.

Senate Report, *supra*, at 3073 (emphasis added).

[77] See nn. 84 to 94 and accompanying discussion.

[78] See n. 38 and accompanying discussion.

[79] See n. 39 and accompanying discussion.

[80] *Cf. Colorado River Indian Tribes v. NIGC*, *supra*, 383 F.Supp.2d at 135, n. 8 ("the power to investigate and enforce does not also imply the authority to create new rules for the agency to investigate and enforce").

b. The Structure of the IGRA Reveals that the Commission Lacks the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Rule.

Similarly, the structure of the IGRA reveals that the Commission lacks the authority to promulgate detailed or pervasive regulations as to the operation of class II gaming of the type included in the Proposed Rule. The Congress provided in the IGRA for standards of operation for tribal gaming in only two areas. First, the issue of operating standards was made by Congress a valid subject for negotiations between tribal governments and states for class III tribal-state gaming compacts.[81] Second, the issue of operating standards are included among the "federal standards" required as to tribal gaming ordinances including as to class II gaming.[82] Neither provision in the IGRA, *i.e.*, as to tribal-state compacts for class III gaming, or tribal ordinances including for class II gaming, mentions or implies any significant involvement by the Commission in developing the actual standards of operation for tribal gaming. Although the Commission has oversight for a tribe's compliance with its gaming ordinance, that oversight does not amount to a power to promulgate terms in addition to the terms required by the IGRA with respect to tribal gaming ordinances. Other provisions in the IGRA also portend a limited role for the Commission that is at odds with the assumption of authority undertaken by the Commission in the Proposed Rule.[83]

c. The Legislative History of the IGRA Reveals that the Commission Lacks the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming or of the Type Included in the Proposed Rule.

A review of the proceedings and the various legislation proposed and considered by the Congress over a five year period prior to the enactment of the IGRA makes clear that the Commission does not have the authority to adopt pervasive regulations for class II or class III gaming. In fact, a thorough review of the consideration by the Congress of Indian gaming legislation during that period leading up to the enactment of IGRA reveals that each of several legislative attempts to provide extensive regulatory authority in the states or in federal agencies over tribal class II gaming was rejected by Congress.[84]

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[81] 25 U.S.C. §2710(d)(3)(C) (includes among the authorized topics for a tribal-state compact for class III gaming "standards for the operation of such activity and the maintenance of the gaming facility, including licensing"); *see also* 25 U.S.C. §2710(d)(7)(B)(vii) (provides that when a state and a tribe cannot agree on a tribal-state compact for class III gaming that the Secretary can step in to "prescribe . . . procedures . . . under which class III gaming may be conducted by the tribe).

[82] *See* 25 U.S.C. §2710(b)(2)(E) and (F) (includes among the "federal standards" for tribal gaming ordinances a requirement that the ordinances provide "the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety," and, "there is an adequate system which . . . ensures . . . that oversight of such officials and their management is conducted on an ongoing basis"). The Proposed Rule calls into question the prior approvals by the Commission of countless tribal gaming ordinances for tribal gaming.

[83] For example, the IGRA provides for limited funding for the Commission. 25 U.S.C. §§2717 and 2718. Second, the implication in the IGRA as originally enacted was that the Commission would meet "at least once every 4 months" and that the associate commissioners might not serve on a full-time basis. 25 U.S.C. §§2704(f) and 2706(c)(1).

[84] Tribal Sovereignty Paper, *supra*.

The Senate Report[85] on S. 555 almost immediately restates the several year record of congressional intent in the enactment of Indian gaming legislation: "S. 555 recognizes the *primary tribal jurisdiction over bingo* and card parlor *operations* although *oversight and certain other powers* are vested in a federally established National Indian Gaming Commission. For class III casino, pari-mutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues."[86]

Comments made by Senator Inouye, who managed the bill on the Senate floor, are also helpful in understanding the underlying intention of the Congress with respect to the limited regulatory role of the Commission. Senator Inouye stated: "(T)he committee has attempted to balance the need for sound enforcement of gaming laws and regulations, *with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands*."[87] The strong federal interest in preserving the sovereign rights of tribal governments is directly contrary to the powers and authority presumed by the Commission in the Proposed Rule.

Senator Evans also evidenced his understanding of the limited scope of the Commission's role. In discussing the amendment to the federal criminal code made by section 23 of S. 555, he noted: "It is my understanding that this language would, for purposes of Federal law, make applicable to Indian country all State laws pertaining to licensing, regulation, or prohibition of gambling *except class I and II gambling which will be regulated by a tribe* and class III gambling which will be regulated by a tribal-state compact."[88] In stating that class II gaming would be regulated by the tribe, Senator Evans made no mention at all of the Commission.[89] The comments by Senator Evans make sense because in a bigger context the IGRA was intended to protect tribal rights to

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[85] Other than Senate and House floor debate, the Senate report is the only formal legislative history on S. 555 as enacted into law. *Cf. Garcia v. United States*, 469 U.S. 70, 76 (1984) ("The authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation," internal quotation marks omitted). This does not, however, discount the value of the legislative history in the 98th, 99th, and 100th Congress as to other bills relating to tribal gaming, including bills with identical or nearly identical language as contained in S. 555, as reported, or the floor debates on the bill that became the IGRA.

[86] Senate Report, *supra*, at 3073 (emphasis added). The Senate Report sets out with clarity congressional intent that tribal governments retained their inherent right to regulate class II gaming and that this inherent right was not divested in favor of the NIGC.

[87] 134 Cong.Rec. at S24022 (daily ed. September 15, 1988) (emphasis added).

[88] 134 Cong.Rec. at S24025 (daily ed. September 15, 1988) (emphasis added).

[89] Senator Evans made another comment that day, which reveals his understanding of the primary role of the tribes in regulation class II gaming:

> Given this fact [tribal success in keeping out organized crime], *the Indian gaming regulatory act should not be construed, either inside or outside the field of gaming, as a derogation of the tribes' right to govern themselves and to attain economic self-sufficiency* . . . With that set of important caveats and warnings, Mr. President, I believe the act which we have before us has come as close as we can to providing appropriate regulation while at the same time not stepping over the boundary and derogating rights of Indian people any more than the rights they gave up 150 years ago in the signing of our treaties.

134 Cong.Rec. at S24028 (daily ed. September 15, 1988) (emphasis added).

engage in gaming and to set out those types of tribal gaming for which the states would be allowed a right to have a say.

After the House received the bill as passed by the Senate, Congressman Udall, the House Manager of the bill, had the bill held at the desk and did not seek its referral to his committee. S. 555 was as he stated: "[A] compromise, hammered out in the Senate after considerable debate and negotiations. It is a solution which is minimally acceptable to me and I support its enactment."[90] The bill was taken up in the House under suspension of the rules, a House procedure that permits no amendments to the bill, but which requires a two-thirds vote for passage. Mrs. Vucanovich of Nevada, who managed the bill for the Republicans, made clear her understanding of the limited, oversight role of the NIGC with respect to class II gaming, stating: "Under the bill, class II gaming will be regulated by the tribes with oversight by a five [sic] member national Indian gaming commission."[91]

Before the enactment of IGRA, it was admitted that the federal government had no statutory power to impose its regulations on the conduct of otherwise legal gaming activities by tribal governments on Indian lands. This was a sovereign right of the tribes. If IGRA took that right away from the tribes and gave it to the Commission, that would be an abrogation of the right. The Senate and the House both made clear the understanding that tribal rights not expressly abrogated were not intended to be affected by the legislation. As Senator Evans so eloquently stated, "If tribal rights are not explicitly abrogated in the language of this bill, no such restriction should be construed."[92] Congressman Udall also set on the record the applicability of the Indian canons of construction and the intent that the canons be applied to the IGRA when he stated: "Mr. Speaker, while this

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[90] 134 Cong.Rec. at H25367 (daily ed. September 26, 1988). Congressman Udall also noted that the language of S. 555 was contained in other bills considered in the House:

> While the Interior Committee did not consider and report S. 555, certain members and committee staff did participate actively in negotiations in the Senate which gave rise to the compromise of S. 555. In addition, many of the provisions of S. 555 are included in House legislation which has been considered by the Interior Committee and the House in this and past congresses.

134 Cong.Rec. at H25376 (daily ed. September 26, 1988).

[91] 134 Cong.Rec. at H25377 (daily ed. September 26, 1988).

[92] 134 Cong.Rec. at H25377 (daily ed. September 26, 1988). Senator Evans was also familiar with those canons when he stated on the Senate floor:

> Furthermore, this bill was drafted with the full understanding of the principles of law which guide our relationship with the Indian tribes.
>
> The inherent sovereign rights of the Indian tribes were reserved by the tribes for the fullest and unencumbered benefit of the Indian people. These rights have been recognized time and time again by the highest courts of our Nation, and they continue in existence except in rare instances where the Congress has exercised its power to restrict them. When this body has chosen to restrict the reserved sovereign rights of tribes, the courts have ruled that such abrogation of tribal rights must have been done expressly and unambiguously.
>
> Many long hours were devoted to this legislation to iron out any possible ambiguities, and we hope to have achieved a bill both clear and concise in this regard. Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed. This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision.

134 Cong.Rec. at S24027 (daily ed. September 15, 1988).

legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. I would expect that the Federal courts, in any litigation arising out of this legislation, would apply the time-honored rule of construction that ambiguities in legislation enacted for the benefit of Indians will be construed in their favor."[93]

The powers assumed by the Commission in the Proposed Rule do not appear in and were not authorized by the Congress under the express terms of the IGRA. The secondary stated purpose of the IGRA, *i.e.*, to provide for "federal standards," refers to the standards stated in the statute. The power of the Commission to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter," as provided for at 25 U.S.C. section 2706, subdivision (b)(10) (referring to only the provisions of the Act codified in Title 25, Chapter 29), refers only to the limited oversight role of the Commission and not to an authority to promulgate additional extra-statutory limitations on the regulatory authority of tribal governments. The Commission is charged with executing the substantive provisions, or standards, of the IGRA as written by Congress, but the Commission does not have the authority to change the IGRA as provided in the Proposed Rule. Again, an agency is owed no deference when the subject matter of the agency's action is not within the authority delegated to the agency by the Congress.[94]

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[93] 134 Cong.Rec. at H25377 (daily ed. September 26, 1988). "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (quotation marks, citation, and alterations omitted). In issues arising under Indian law, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* (*citing McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973)); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) ("[I]f there is ambiguity . . . the doubt would benefit the tribe, for ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence"); *Cobell v. Norton*, 240 F.3d 1081, 1101, 1103 (D.C. Cir. 2001) ("while ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration, Chevron deference is not applicable in this case . . . [T]he canon of liberality of construction in favor of Indians acts with its 'special strength' even where a federal agency would in other cases enjoy the implied authority to implement ambiguous statutory language supporting a competing interpretation").

The Indian canon only has a role in the interpretation of an ambiguous statute. *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 637 (D.C. Cir. 1994) ("Which construction of the Act favors the Indians . . . In this case there is no need to choose . . . When the statutory language is clear, as it is here, the canon may not be applied"); *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (court concluding where statute "unambiguously confers jurisdiction" "we therefore have no occasion to resort to this [Indian] canon of statutory construction"). Where as here the statute is clear as to the limited oversight role and rulemaking authority of the NIGC for class II gaming (and as discussed in these comments the statute plainly did not authorize the NIGC to promulgate regulations such as the Proposed Rule), there is no need to apply the canons. However, if the NIGC (as it has in recent public meetings) seeks to advance the position that the IGRA is ambiguous as to the NIGC's rulemaking authority and the Proposed Rule is intended to "help" the tribes, that position would not be a proper application of the Indian canon of construction. *See, e.g., Colorado River Indian Tribes v. NIGC, supra*, 383 F.Supp.2d 123, 146-147 ("Except in rare cases where it has acted recklessly, the federal government will claim in every case to have the best interests of the Indian tribes in mind . . . To hold that the canon always favors the conduct of the federal government in such a circumstance would strip the canon of its salutary role in protecting the position of the Indian tribes in the trust relationship . . .The MICS for class III gaming represents a significant incursion on tribal sovereignty, superseding less stringent tribal gaming ordinances . . .and subjecting tribes to a range of new controls and lengthy audits . . . The Court will not read the Indian canon to favor the agency's position simply because the agency is well intentioned"); *United States v. Errol D., Jr.*, 292 F.3d 1159, 1163-64 (9th Cir. 2002) ("Because the [statute] constitutes an incursion into the tribal sovereignty of Indian tribes, justified by the 'guardianship' powers of Congress, ambiguous provisions in the [statute] must be interpreted in favor of the tribes"); *Michigan v. EPA*, 268 F.3d 1075, 1085 (D.C. Cir. 2001) ("If anything, by claiming independent federal jurisdiction over 'in question' areas, [the agency] is construing these statutes for its own benefit").

[94] See n. 75 and accompanying discussion.

3. The General Purposes of the IGRA Do Not Grant the Commission the Authority to Change the Jurisdictional Framework in the IGRA by Changing the Definitions of Class II Gaming or to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Rule.

The Commission cannot properly, and should not, rely upon the general purposes of the IGRA to support an ever increasing role for the Commission in the oversight regulation of tribal gaming including as provided in the Proposed Rule.

First, the general purposes of the IGRA, and its substantive provisions, do not support the Proposed Rule.[95] Second, several oversight and legislative hearings have been held since 1988 by committees of the Congress on the implementation of the IGRA and on Indian gaming in general.[96] These oversight and legislative hearings have demonstrated the clear, post-IGRA understanding of the limited scope of the Commission's authority over class II gaming. Representations made by the Commission in these oversight hearings contained explicit denials of power in the Commission to promulgate and enforce pervasive class II gaming regulations such as the Proposed Rule.[97] Representations made by the Commission in these prior oversight hearings also demonstrated the Commission's recognition and understanding of a difference in type and degree of regulation, *i.e.*, between that of oversight as intended and provided by the Congress in the IGRA and the type of pervasive regulation envisioned now by the Commission in the Proposed Rule.[98]

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[95] *See* 25 U.S.C. §2702.

[96] See 25 U.S.C. §2706(c) (requiring periodic reports to the Congress).

[97] For example, on April 20, 1994, the Senate Committee on Indian Affairs held an oversight hearing in part on the role of the federal government in the regulation of Indian gaming activities. Anthony J. Hope, Chairman of the NIGC, testified. The following excerpt from his written statement reveals that even the NIGC understood that it lacked general regulatory authority over class II gaming:

> In enacting IGRA, the Congress recognized that different degrees of regulation are required for different forms of gaming. However, it made the regulation of Indian gaming more complicated by dividing regulation among several federal agencies, the tribes, and the many states where Indian gaming is conducted . . . [C]lass II gaming is bingo, bingo related games and certain non-banking card games and is regulated primarily by the tribes with *oversight* by the Commission . . . The primary responsibility for the regulation of class II gaming falls to the Indian tribes . . . *In class II, the post-licensing regulation, or the day-to-day operational regulation, is performed by the tribe with oversight by the Commission . . . The Commission lacks the authority usually found in a comprehensive independent regulatory agency.* For example, the Commission has *no authority* to impose (1) *standards for the conduct of class II games*, (2) internal and financial controls, or, (3) standards for licensing vendors and suppliers.

Testimony of Anthony J. Hope, *cited in*, Tribal Sovereignty Paper (emphasis added); *see Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) ("[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view," quotation omitted); *Pennsylvania Medical Society v. Snider*, 29 F.3d 886, 895 (3d Cir. 1994) (holding under *Chevron* step one that "the statutory language, context and legislative history demonstrate that Congress has spoken on the issue" averse to the agency, and emphasizing that even the agency had previously shared that view of the statute); *Colorado River Indian Tribes v. NIGC, supra*, 383 F.Supp.2d at142 (court noting that "it would blink reality to ignore the fact even the defendant agency tasked with implementing the statute had earlier taken the view that it lacked the authority to issue the regulations in question").

[98] Chairman Hope's statement on April 20, 1994, also discussed a need from the perspective of the NIGC for standards for class II and III gaming. The following extensive quote from his statement further makes clear the fact that IGRA did not vest in the NIGC the powers it now claims:

The requirements, as contemplated by the Proposed Rule, of certifications prior to the play of class II gaming, represent an improper back-door attempt by the Commission to regulate the issues raised in the Proposed Rule and improperly intrude upon tribal sovereignty and matters or decisions reserved for tribal governments under the wording and structure of the IGRA, *i.e.*, on matters already addressed by the Congress in the IGRA. The combination of certifications and detailed classification standards in the Proposed Rule represents a pre-condition not authorized in the IGRA to a tribal government's decision to engage in gaming. The attempted assumption of jurisdiction by the Commission in areas for which jurisdiction has not been authorized by the Congress will lead to increased tensions and confusion between tribal governments and other agencies for which jurisdiction has appropriately been authorized by tribes, by agreement, or by Congress by statute.

The Proposed Rule is not a valid exercise of the provision in the IGRA appearing to authorize the Commission to "promulgate such regulations and guidelines as it deems proper to implement the provisions of this chapter."[99] An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority.[100]

> If Congress is going to impose responsibility on the federal government, however, it must recognize that the logical instrumentality, the NIGC, as presently structured, cannot possibly provide the type and degree of regulation required. Its *powers* and *staffing* would have to be greatly expanded and restructured.
>
> If the Commission is authorized to regulate class III gaming, it must be authorized to impose such regulations as it deems appropriate on the tribal operations. The federal regulator should not be expected or required to negotiate with the tribes as the states now are under the IGRA. The compact negotiation mechanism was designed to allow two sovereign governments to negotiate as equals to accommodate their respective interests. The decisions of an agency of the federal government as to what regulation is necessary should not be subject to negotiation. The agency's decisions and actions would, of course be subject to judicial review under the usual standards.
>
> **Minimum Standards**
>
> The Congress should set minimum standards for the regulation and monitoring of class III gaming, or authorize the Commission to prescribe them by regulation. In addition to responsibility for initial procedures, such as ordinance and contract review and arranging for background checks, the Commission should be empowered to prescribe rules for the *internal control* over money and chips, extension of credit, security, auditing, *and similar functions*. If it is given responsibility of regulating class III gaming, it should be empowered to regulate in the same manner as gaming commissions in the states. *It should be empowered to enforce standards set by statute or committed by statute to its discretion.*
>
> *These powers should also be extended to class II operations.*

Testimony of Anthony J. Hope, *cited in*, Tribal Sovereignty Paper (emphasis added); *see also* NIGC Website, http://www.nigc.gov/AboutUs/FrequentlyAskedQuestions/tabid/57/Default.aspx#q_31 (website last visited November 13, 2006) ("Although the budget of the Commission has not grown proportionately to the growth of the Indian gaming industry, it is important to note that *tribal gaming commissions are the primary regulators of gaming operations . . . The role of the Commission is to monitor and validate the work of tribal gaming regulators* . . . Further, depending on individual Tribal-State compacts, some states may also play a regulatory role in Indian gaming operations" and "In general, the Commission does not specifically approve the opening of every Indian casino or gaming facility . . . However, before a tribe may operate a gaming facility, the NIGC must have reviewed and approved a tribe's gaming ordinance . . . A tribe must also license every gaming facility . . . In addition, the land upon which the gaming operation will be located must be Indian land for gaming purposes . . . If a tribe wishes to have management by a third party, the Commission must review and approve the management contract").

[99] 25 U.S.C. §2706(b)(10). For the reasons stated in these comments, and others, the Proposed Rule does not fit into the holding or rationale of *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973). The notion that a statute may be interpreted to conform to some view of its general purposes, even if the resulting interpretation is at odds with the statute's clear language, structure, and legislative history, has long been rejected. As the Supreme Court has explained:

"All questions of government are ultimately questions of ends and means."[101] Agencies such as the Commission are therefore "bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate and prescribed, for the pursuit of these purposes."[102] Here, Congress provided not only the purposes of the IGRA but also the means to accomplish these purposes through the "statutory basis for the regulation of gaming by an Indian tribe" provided in the IGRA. The Proposed Rule does not comport with the means selected by the Congress for effectuating the purposes of the IGRA.

The Commission lacks the statutory authority under IGRA to promulgate, and impose upon tribal governments, the very kind of detailed controls that the Commission is now attempting to adopt in the Proposed Rule. The present Proposed Rule goes to the core of the jurisdictional framework between tribes and states imposed by Congress on tribal gaming. On both scores, *i.e.*, overly pervasive regulation and the attempted alteration of the jurisdictional framework in the IGRA, the Proposed Regulations violate the basic rules of federal Indian law and the IGRA. The IGRA does not authorize or support the NIGC's Proposed Rule. The IGRA is clear and unambiguous as to the limited scope of the NIGC's authority. Any effort by the NIGC to occupy a regulatory role with respect to the subject matters at hand in the Proposed Rule, including a redefining of the jurisdictional framework established by Congress in the IGRA, is arbitrary, capricious, and contrary to law.[103]

> Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-374 (1986).

Read in context, the IGRA does not contain a broad delegation of rulemaking authority to the NIGC. However, even if such a broad delegation existed in the IGRA, a broad delegation of rulemaking authority would not allow an agency to ignore the plain text of the statute. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (holding that it is "far-fetched" to read a provision that directs agencies to "utilize their authorities in furtherance of the purposes" of the Endangered Species Act to "implicitly supersede" statutory language channeling the agency's powers and thereby authorize an agency "to do 'whatever it takes' to protect the threatened and endangered species"); *Public Serv. Comm. of State of New York v. FERC*, 866 F.2d 487, 491-492 (D.C. Cir. 1989) (grant of authority to an agency "to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter" does not "overrid[e] the balance achieved" in the rest of the statute and such authority "cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined," quotations omitted).

[100] *See Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002) ("Our previous decisions, *Mourning* included, do not authorize agencies to contravene Congress' will in this manner").

[101] *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 290 (D.C. Cir. 1993).

[102] *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231, n. 4 (1994); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) ("vague notions of a statute's basic purpose are . . . inadequate to overcome the words of its text regarding the specific issue under consideration," quotation and emphasis omitted); *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433, 436 (9th Cir. 1994) ("We would be writing a different statute, not just construing it, by treating the words as having no meaning and looking instead to the values underlying the language to be construed so that we can create law effectuating those values," quotations omitted).

[103] Any effort by the NIGC to occupy an "assumed" regulatory role subjects tribal governments to an illusory regulation (*i.e.*, a regulation not authorized by Congress) under which tribes must either comply with an invalid regulation or face the time, energy, and money associated with defending against merit less efforts by the NIGC to claim jurisdiction and take enforcement actions. The Proposed Rule also constitutes an abuse of

C. The Proposed Rule Effectively Calls into Question Eighteen Years of Judicial and Administrative Decisions on Which Tribes, States, and Others have Relied; A Clear Need for the Proposed Rule does not Exist.

In connection with the definition of class II gaming, the federal government, states, and tribes, have invested substantial time, energy and money. The authorities on game classification under the IGRA presently include the IGRA, its legislative history, to a limited extent the Johnson Act and its legislative history, and eighteen year's worth of federal cases applying the IGRA and the Johnson Act to tribal gaming, prior regulations and other final agency actions by the NIGC,[104] and, to the extent well-reasoned, prior informal statements and opinions of the NIGC.[105] The result is a well-defined classification scheme that has been established from and after the enactment of the IGRA and that includes relevant statutes,[106] legislative histories,[107] federal court cases,[108] NIGC

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discretion to the extent that the NIGC has discretion as to the subject matter of the Proposed Rule. Our concern in this area continues given the NIGC's recent practice in connection with other regulatory initiatives of "assuming authority until the NIGC is told otherwise" as is the case in the area of minimum internal control standards, the Proposed Rule, the class II Technical Standards Regulations, health and safety standards, facility licensing standards, *etc.* In that regard, the Proposed Rule represents an unauthorized expenditure by the Commission of funds collected by the Commission from tribal governments. Fees collected by the Commission from tribal governments may be used by the Commission only to carry out duties authorized by the IGRA. 25 U.S.C. §2717a ("fees collected . . . shall be available to carry out *the duties* of the Commission . . .," emphasis added). Again, the limited provision of funding for the NIGC in the IGRA is consistent with the fact that the NIGC, although having an important role to play, has a limited role under the IGRA.

[104] *See* n. 34 and accompanying discussion.

[105] Courts also "consider the opinion letters issued by the Commission that the interpret [IGRA] and the interpretations of [IGRA] set forth by the Commission in the Federal Register." *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000). Although such informal statements of the NIGC are not entitled to the same deference as may be provided the agency's regulations under *Chevron*, such informal statements and opinions may be "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Christensen v. Harris County*, 529 U.S. 576, 586-588 (2000). Under *Skidmore*, the weight to be afforded non-binding agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and those factors giving it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

[106] *E.g.*, 25 U.S.C. §§2703 and 2710; 18 U.S.C. §1166; and, 15 U.S.C. §§1171, *et seq.*

[107] *See Senate Report, supra*; 126 Cong. Rec. S23883 (September 15, 1988) (Sens. Domenici, Reid, and Burdick) ("IGRA Debate"); H.R. Rep. No. 2769, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. Serv. 4240 ("1950 Gambling Devices Report"); and, H.R. Rep. No. 1828, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Ad. News Serv. 4240 ("1962 Gambling Devices Report").

[108] *E.g.*, *California v. Cabazon Band of Mission Indians, supra*, 480 U.S. 202; *Cabazon Band of Mission Indians v. NIGC*, 827 F. Supp. 26 (D.D.C. 1993), *aff'd*, 14 F.3d 633 (D.C. Cir. 1994); *Cabazon Band of Mission Indians v. NIGC, supra*, 14 F.3d 633 (D.C. Cir. 1994); *Diamond Game Enterprises v. Reno*, 9 F.Supp.2d 13 (D.D.C. 1998), *rev'd*, 230 F.3d 365 (D.C. Cir. 2000); *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 742 F.Supp. 1033 (W.D. Wisc. 1990), *aff'd* 951 F.2d 757 (7th Cir. 1991); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757 (7th Cir. 1991); *Shakopee Mdewakanton Sioux Community v. NIGC*, 798 F.Supp. 1399 (D. Minn. 1992), *aff'd*, 16 F.3d 261 (8th Cir. 1994); *Shakopee Mdewakanton Sioux Community v. NIGC*, 16 F.3d 261 (8th Cir. 1994); *Spokane Tribe of Indians v. United States*, 782 F.Supp. 520 (E.D. Wash. 1991), *aff'd* 972 F.2d 1090 (9th Cir. 1992); *Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992); *Sycuan Band of Mission Indians v. Roache*, No. 91-1648 (BTM) (S.D. Cal., March 30, 1992), *reprinted in* 19 Indian L.Reptr. 3079 (April 1992), *aff'd.*, 54 F.3d 535 (9th Cir. 1995); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995), *cert. denied, Sycuan Band of Mission Indians v. Pfingst*, 516 U.S. 912 (1995); *United States v. Santee Sioux Tribe of Nebraska*, 174 F.Supp.2d 1001 (D.Neb. 2001), *aff'd*, 324 F.3d 607 (8th Cir. 2003); *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), *cert. denied*, 540 U.S. 1229 (2004); *United States v. 103 Electronic Gambling Devices*, 1998 W.L. 827586 (N.D. Cal., November 23, 1998), *aff'd* 223 F.3d 1091 (9th Cir. 2000); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 1998 U.S. Dist. Lexis 17293 (N.D. Okla., October 23, 1998); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); and, *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), *cert. denied, Ashcroft v. Seneca-Cayuga Tribe*, 540 U.S. 1218 (2004).

regulations and agency actions,[109] and NIGC informal statements published in the federal register,[110] bulletins,[111] and advisory opinions.[112]

A careful review of these existing authorities on game classification reveals that the present Proposed Rule calls into question the extensive and detailed classification framework developed by the federal government, states, and tribes, and relied upon by tribes and states, over the eighteen year period following the enactment of the IGRA. A careful review of these existing authorities on game classification reveals that the purported "need"[113] argued by the Commission for further "clarification" through the Proposed Rule of the classification scheme in the IGRA does not exist. A number of courts have indicated that the classification scheme in the IGRA is both clear and

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[109] *E.g.*, 25 C.F.R. §§502.2, 502.3, 502.4, 502.7, 502.8, 502.9, and 502.11. *See* 57 Fed. Reg. 12382 (April 9, 1992) ("1992 Definitions"). Sections 502.7, 502.8, and 502.9 of the NIGC's initial definitions were replaced effective July 17, 2002, by NIGC's Final Rule on Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166 (June 17, 2002) ("2002 Definitions").

[110] *E.g.*, NIGC's Final Rule on Definitions Under the Indian Gaming Regulatory Act, 57 Fed.Reg. 12382 (April 9, 1992); NIGC's Final Rule on Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166 (June 17, 2002); and, NIGC Notice of Withdrawal of Proposed Rule on Classification of Games, 67 Fed.Reg. 46134 (July 12, 2002); *see also*, NIGC Proposed Rule on Classification of Games, 64 Fed.Reg. 61234 (November 10, 1999); NIGC Proposed Rule Withdrawing Definitions: Electronic or Electromechanical Facsimile, 66 Fed.Reg. 33494 (June 22, 2001); and, NIGC Proposed Rule on Definitions: Electronic or Electromechanical Facsimile, Games Similar to Bingo, and Electronic, Computer, or other Technologic Aids to Class II Games, 67 Fed.Reg. 13296 (March 22, 2002).

[111] *E.g.*, NIGC Bulletin 93-4 (July 19, 1993) (*Cabazon Band of Mission Indians v. NIGC*); NIGC Bulletin 93-6 (October 26, 1993) (Commission enjoined in *Cabazon* case); NIGC Bulletin 94-1 (February 4, 1994) (*Cabazon Band of Mission Indians v. NIGC*); NIGC Bulletin 95-2 (October 24, 1995) (Pull-tab sales on Indian lands); NIGC Bulletin 98-1 (January 14, 1998) (Charitable Gaming); NIGC Bulletin 99-2 (August 18, 1999) (Class II games); and, NIGC Bulletin 03-3 (December 23, 2003) (Guidance on Classifying Games with Pre-Drawn Numbers).

[112] *E.g.*, NIGC Letter (September 14, 1992) (Cashpot); NIGC Letter (May 25, 1993) (Oasis); NIGC Letter (May 23, 1994) (Instant Scratch-Off); NIGC Letter (June 7, 1994) (Wildfire); NIGC Letter (November 14, 1994) (Pull-tabs); NIGC Letter (March 20, 1995) (Shooter Bingo); NIGC Letter (July 10, 1996) (MegaMania); NIGC Letter (November 12, 1996) (Wild Ball Bingo); NIGC Letter (April 9, 1997) (MegaMania); NIGC Letter (July 22, 1997) (Rocket Classics); NIGC Letter (July 23, 1997) (MegaMania); NIGC Letter (August 1, 1997) (Rocket Ante Up); NIGC Letter (June 8, 1998) (Tab Force); NIGC Letter (October 15, 1998) (All Star); NIGC Letter (April 7, 1999) (Crazy Reels); NIGC Letter (June 18, 1999) (Challenger 9); NIGC Letter (November 2, 1999) (Play Pull-Tab); NIGC Letter (February 29, 2000) (Magical Irish); NIGC Letter (June 9, 2000) (U-PIK-EM Bingo); NIGC Letter (June 21, 1999) (Tele Bingo); NIGC Letter (August 9, 1999) (NIB); NIGC Letter (November 2, 1999) (Evergreen); NIGC Letter (October 26, 2000) (Internet Bingo); NIGC Letter (November 2000) (NIB); NIGC Letter (March 13, 2001) (Win Sports Betting); NIGC Letter (March 27, 2001) (Wild Ball Bingo); NIGC Letter (May 31, 2001) (Break the Bank); NIGC Letter (2002) (Lima); NIGC Letter (April 15, 2002) (MegaNanza); NIGC Letter (November 5, 2002) (VGT Bingo); NIGC Letter (September 23, 2003) (Reel Time Bingo); NIGC Letter (September 26, 2003) (Mystery Bingo); NIGC Letter (October 17, 2003) (Phone Card Sweepstakes); NIGC Letter (January 7, 2004) (Reel Time Bingo); NIGC Letter (May 7, 2004) (Mystery Bingo); NIGC Letter (May 26, 2004) (Mystery Bingo); NIGC Letter (June 4, 2004) (Classic II Pull Tab System); NIGC Letter (October 18, 2004) (Rocket FastPlay Bingo 1.0); NIGC Letter (December 21, 2004) (DigiDeal Digital Card System); NIGC Letter (December 23, 2004) (Triple Threat Bingo); NIGC Letter (April 4, 2005) (Nova Gaming Bingo System); NIGC Letter (June 24, 2005) (Electronic Game Cards); and, NIGC Letter (August 25, 2005) (Nova Gaming Bingo System version 4.2.5.9). We do not agree with the analysis employed by the NIGC in each of its advisory opinions or other informal statements.

[113] As discussed below, the stated goal of the NIGC in support of adoption of the 2002 Definitions was also a purported "need" for amending the existing definition regulations to bring added clarity and, yet, the NIGC did not do so as to the then two key, potentially open issues surrounding game classification, *i.e.*, the relationship of the Johnson Act to technology played with class II gaming and the relationship between class II bingo-related games and class III lottery games. Fortunately, the distinction between class II bingo games (which are by definition lottery games Congress specifically made class II gaming under the IGRA), and class III lottery games, has previously been addressed in a series of court cases and otherwise addressed by the NIGC in its regulatory Definitions. The relationship between the Johnson Act and the IGRA has also been addressed in a series of prior court cases.

unambiguous including as to the Commission's principal focus in the Proposed Rule on the definition of bingo and as to allowed technology.[114]

As to allowable class II technology, the courts have already squared the relationship of the Johnson Act's prohibition for gambling devices with the IGRA's permitted use of technologic aids with class II gaming. The lack of an express exemption under the IGRA from the Johnson Act for class II gaming[115] early on raised a question over the Johnson Act's application to aids to the play of class II bingo related gaming. The courts early on recognized that, except for the IGRA's repeal of the Johnson Act with respect to certain compacted class III gaming, "there is no other repeal of the Johnson Act, either express or by implication, in the IGRA . . . [I]n 25 U.S.C. §2710(b)(1)(A), Congress specifically states that class II gaming is subject to Federal law and the Senate Report states that the applicable "Federal law" is the Johnson Act, 15 U.S.C. §1175."[116]

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[114] *See. e.g., Oneida, supra*, 742 F.Supp. 1033, 1038 (meaning of "lotto" in class II gaming); *Oneida, supra*, 951 F.2d 757, 764 (same); *Cabazon Band, supra*, 827 F.Supp. 26, 33 (meaning of "facsimile"); *Cabazon Band, supra*, 14 F.3d 633, 637 (meaning of "facsimile"); *Sycuan Band, supra*, 54 F.3d 535, 543 (meaning of "facsimile"); *103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096 (IGRA's definition of bingo). As the meaning of "facsimile" and "bingo" are clear from the wording of the statute, further definitions as included in the Proposed Rule are both unnecessary and improper.

[115] Congress included an express exemption in the IGRA from the Johnson Act only for certain class III gaming subject to a tribal-state compact. 25 U.S.C. §2710(d)(7) ("The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that . . . is entered into . . . by a State in which gambling devices are legal"). Although not providing an express exemption in the IGRA from the Johnson Act for class II gaming, Congress allowed for the use of technologic aids to class II bingo related gaming. 25 U.S.C. §2703 (7). Congress' intention under the IGRA that the Johnson Act's prohibitions of gambling devices defined under 15 U.S.C. section 1171(a)(2) (gambling devices other than mechanical reel devices) not be applied to prohibit "electronic, computer, or other technologic aids" used in connection with class II bingo-related gaming is evidenced in part through the legislative history of the IGRA. A part of that legislative history provides:

> *Class II gaming* is defined in section 4(8)(A)(B)(C) and (D) Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends in section 4(8)(A)(i) that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing games sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.
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> * * *
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> The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands. The Committee specifically notes the following sections in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303-1307, 1952-1955 and 1961-1968; 39 U.S.C. 3005; and except as noted above 15 U.S.C. 1171-1178.

Senate Report, *supra*, at 3079, 3082.

[116] *Cabazon Band, supra*, 827 F.Supp. 26, 31.

The courts have uniformly concluded that the IGRA and the Johnson Act can be read together.[117] The courts have applied this conclusion (namely, that the Johnson Act and the IGRA can be read together), but have used two different paths of analysis, to allow "aids" to class II bingo gaming and without violation of the Johnson Act's prohibition against "gambling devices."

Under the first path of analysis, a number of courts have held that if technology used with a class II game is an "aid," then the technology does not violate the Johnson Act. *E.g.*, *Seneca-Cayuga Tribe*, *supra*, 327 F.3d 1019, 1035 ("we hold that if a piece of equipment is a technologic aid to an IGRA class II game, its use . . . within Indian country is then necessarily not proscribed as a gambling device under the Johnson Act . . . If a piece of equipment is an IGRA class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a 'gambling device' proscribed by the Johnson Act").[118] The first path of analysis employed by the courts may be viewed as giving the Johnson Act's definition of "gambling device" a narrow interpretation when applied to "aids" to class II gaming.[119]

Using a second path of analysis to read the Johnson Act together with the IGRA as to class II gaming, one court has held that to be permitted under the IGRA the technology used with a class II game must violate neither the IGRA's exclusion of facsimiles from class II gaming nor the Johnson Act's prohibition against gambling devices. *Santee Sioux Tribe*, *supra*, 324 F.3d 607 (stating that "the argument that the IGRA implicitly repeals the Johnson Act with respect to class II devices is not well taken, even though some version of this view has been expressed by several courts," and concluding that "the Tribe must not violate either act").

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[117] *103 Electronic Gambling Devices*, *supra*, 223 F.3d 1091, 1101 ("What matters now is how the two are to be read together – that is how two enactments by Congress over thirty-five years apart most comfortably coexist, giving each enacting Congress' legislation the greatest continuing effect"); *162 MegaMania Gambling Devices*, *supra*, 231 F.3d 713 ("We conclude that the Johnson and [Indian] Gaming Acts are not inconsistent and may be construed together in favor of the Tribes"); *Santee Sioux Tribe*, *supra*, 324 F.3d 607, 611 ("We agree with the government that the two acts can be read together"); *Seneca-Cayuga Tribe*, *supra*, 327 F.3d 1019, 1035 ("our task, as we have explained, is to read the Johnson Act and IGRA together giving each Congress' enacted text the greatest continuing effect").

[118] *See also 103 Electronic Gambling Devices*, *supra*, 223 F.3d 1091, 1102 ("while complete, self-contained electronic of electromechanical facsimiles of a game of chance, including bingo, may indeed be forbidden by the Johnson Act after the enactment of IGRA . . . we hold that mere technologic aids to bingo . . . are not"); *162 MegaMania Gambling Devices*, *supra*, 231 F.3d 713, 725 ("We further conclude Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid"); *Diamond Game Enterprises*, *supra*, 230 F.3d 365, 367 ("Both the Commission's regulations and this court have interpreted IGRA as limiting the Johnson Act prohibition to devices that are neither Class II games approved by the Commission nor class III games covered by tribal-state compacts"); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (holding "Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games under the IGRA . . . Thus, the IGRA makes 15 U.S.C. §1175 . . . inapplicable to class II bingo and lotto gaming"), *aff'd sub nom.*, *United States v. Cook*, 922 F.2d 1026 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991); *cf. Cabazon Band*, *supra*, 827 F.Supp. 26, 31-32 (concluding the Johnson Act does not apply to aids to a class II game).

[119] A number of courts have noted that the Johnson Act is to be given a narrow interpretation so as to allow "aids" to class II bingo gaming. *E.g.*, *Cabazon Band*, *supra*, 827 F.Supp. 26, 31 ("Plaintiffs' main objection . . . stems from their perception that the definition of gambling device sweeps within its ambit any device that might be used in gambling. . . When the scope of the Johnson Act is properly determined, it is clear that the definition of gambling devices is significantly less broad than plaintiffs fear"), and, *162 MegaMania Gambling Devices*, *supra.*, 1998 U.S. Dist. Lexis 17293 (N.D. Okla., October 23, 1998) ("Tribes have objected in other litigation to the effect of the interpretation presented by the government . . . asserting that it sweeps within the definition of 'gambling device' any device that might be used in gambling . . . The objection has been rejected, based on a narrowed definition . . . The court finds this narrowed definition correct, and necessary to reconcile the statutory language and case law"), *aff'd*, 231 F.3d 713.

The two paths of analysis are not irreconcilable and, in fact, the Supreme Court refused to hear either the *Santee Sioux* case or the *Seneca-Cayuga* case. Both paths of analysis can be squared by concluding, as have the courts, that:

> As several cases have held . . . Congress has acknowledged . . . and the Commission has noted in the preamble to its rules [the 1992 Definitions], the Johnson Act applies only to *slot machines and similar devices* . . . not to aids to gambling (such as bingo blowers and the like). When the scope of the Johnson Act is properly determined, it is clear that the definition of gambling devices is significantly less broad than plaintiffs fear.

Emphasis added. *Cabazon Band, supra*, 827 F.Supp. at 31-32 (*citing* Senate Report, *supra*, at 3082); *see also Diamond Games, supra*, 230 F.3d 365, 367 (*citing Cabazon Band, supra*, 14 F.3d at 635, n. 3, as supporting the proposition that "Class II aids, permitted under IGRA, do not run afoul of the Johnson Act").[120] The Commission has not provided adequate justification for the drastic revision of the IGRA's classification scheme as presented in the Proposed Rule.[121]

D. The Proposed Rule Violates the IGRA and Binding Judicial Precedent.

Congress provided a clear definition of class II gaming in the IGRA. Congress defined class II gaming *inter alia* as follows:

> (7)(A) The term "class II gaming means –
> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

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[120] In revising its definitions regulations in 2002, in which the Commission removed the 1992 Definitions equating "facsimile" with Johnson Act "gambling device" and restated the definition in its current form (which the Commission now seeks to change again in the Proposed Rule) of a modified standard of "replicates," the Commission stated:

> The Commission now believes that in the infancy of IGRA, its original definitions simply had not fully reconciled the language of IGRA with the Johnson Act. The Commission now determines that IGRA does not in fact require an across-the-board treatment of all Johnson Act gambling devices as class III games. Stated differently, 'Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a class II game, and is played with the use of an electronic aid.' *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000) . . . From the Commission's perspective, the Johnson Act has proven remarkably troublesome as a starting point in a game classification analysis under IGRA. . . . This is due in large part to its fundamentally different purpose. The Johnson Act is intended to determine whether something is a 'gambling device.' IGRA, on the other hand, is intended to distinguish between classes of gaming. Within the context of IGRA, there is no question as to 'gambling' per se – all Indian gaming is 'gambling.' Accordingly, determining whether the Johnson Act covers a particular device simply does not answer the question relevant to Indian gaming: whether the game is class II or class III. The appropriate threshold for a game classification analysis under IGRA has to be whether or not the game played utilizing a gambling device is class II. If the *device* is an aid to the play of a class II game, the game remains class II; if the *device* meets the definition of a facsimile, the game becomes class III.

Final Rule, *supra*, 67 Fed.Reg. at 41169-70 (emphasis added). The Commission in revising its definitions regulations in 2002 correctly stated the relationship between the IGRA and the Johnson Act, particularly as it relates to games of bingo, lotto, and other games similar to bingo, namely, the Johnson Act definition of "gambling device" does not extend to prohibit "aids" to class II gaming. This conclusion is apparently paraphrased sometimes as "the Johnson Act is not relevant to game classification under the IGRA."

[121] In fact, after page after page of detailed extra-statutory requirements in the proposed part 546, the Proposed Rule remains founded on vague and ambiguous extra statutory terms in proposed §502.8 (using vague and ambiguous terms such as "replicates," "incorporating," "an element of the game," "format," and "competing") and in proposed §502.9 (using vague and ambiguous terms such as "variant," "compete," and "common"). Respectfully, the Proposed Rule will not bring clarity to class II gaming.

> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,
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> including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other game similar to bingo . . .
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> * * *
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> (B) The term "class II gaming" does not include –
> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.
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> (8) The term "class III gaming" means all forms of gaming that are not class I or class II gaming.

25 U.S.C. §2703, subds. (6), (7), and (8).

The federal courts have held that "IGRA's three explicit criteria . . . constitute the sole legal requirements for a game to count as class II bingo."[122] The courts have also recognized that Congress intended that class II bingo-related gaming constitute *a class or set of games*.[123] The sole exclusion of bingo-like games from class II gaming are live lottery games with a method of play similar to those played by state lotteries.[124] The courts have also held that technology may be used

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[122] *103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096 (noting "There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria . . . The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?").

[123] "IGRA includes within its definition of bingo 'pull tabs, . . . punchboards, tip jars, [and] instant bingo . . . [if played in the same location as the game commonly known as bingo]' . . . none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children." *103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096; *Oneida Tribe of Indians of Wisconsin, supra*, 951 F.2d 757, 763 ("Although not all the games named in §2703 (7)(A) may be bingo-like, either physically or procedurally, clearly the emphasis is bingo").

[124] *Oneida Tribe of Indians of Wisconsin, supra*, 951 F.2d 757 (7th Cir. 1991) (defines game of lotto as included in the IGRA as class II gaming and determining that lotto as used in the IGRA "does not mean lottery in general or the type of lottery operated by various states and denominated 'lotto' or some derivative thereof"); *Spokane Indian Tribe, supra*, 972 F.2d 1090 (defines game of lotto under the IGRA noting that "the legislative history of the IGRA demonstrates that Congress did not intend to include lotteries when it used the term 'lotto' in the definition of class II gaming . . .").

with all class II bingo-related gaming.[125] Again, a number of courts have indicated that the classification scheme in the IGRA is both clear and unambiguous.[126]

The basis for these court decisions is found in the statute and in the legislative history for the IGRA.[127] Although often quoted in support of the use of technology with class II gaming, the Senate Report also speaks to congressional intent not to limit bingo games to only certain bingo game designs. Congress specifically recognized in the Senate Report that bingo comes in different forms.[128] In that regard, the Senate Report also makes clear Congress' intent that state law limitations on the method of play of charitable or commercial bingo games do not apply to class II bingo *or to pull-tab gaming.*[129]

Congress intended that tribes have the benefit of advances or evolution in both game design and technology. However, a review of the Proposed Rule reveals that the Commission seeks to impose

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[125] *Seneca-Cayuga Tribe of Oklahoma, supra*, 327 F.3d 1019, 1032 ("IGRA further provides that 'electronic, computer, or other technologic aids' to such games are class II gaming, and therefore permitted in Indian Country" and ". . . through IGRA, Congress specifically and affirmatively authorized the use of class II technologic aids . . ."); *see Diamond Games Enterprises, supra*, 230 F.3d 365 (holding that an electromechanical dispenser of pull-tabs is a permitted class II aid); *cf. Santee Sioux Tribe of Nebraska, supra*, 324 F.3d 607, 613 (8th Cir. 2003) (noting that "we believe that the phrase 'whether or not electronic, computer, or other technologic aids are used in connection therewith' applies only to bingo," but concluding that "nothing in the statute proscribes the use of technologic aids for any games, so long as the resulting exercise falls short of being a facsimile").

[126] *See, e.g., Oneida, supra*, 742 F.Supp. 1033, 1038 (meaning of "lotto" in class II gaming); *Oneida, supra*, 951 F.2d 757, 764 (same); *Cabazon Band, supra*, 827 F.Supp. 26, 33 (meaning of "facsimile"); *Cabazon Band, supra*, 14 F.3d 633, 637 (meaning of "facsimile"); *Sycuan Band, supra*, 54 F.3d 535, 543 (meaning of "facsimile"); *103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096 (IGRA's definition of bingo).

[127] The Senate Report, in explaining Congress' intent behind the IGRA, states:

> Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends . . . that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribe should restrict *class II games* to existing *game sizes, levels of participation*, or *current technology*.

Senate Report, *supra*, at 3079 (emphasis added). "Under S. 555, class II is the term used for bingo, lotto, some types of card games, as well as other forms of bingo-type gaming such as pull-tabs, punch cards, tip jars, and the like." Senate Report, *supra*, at 3073.

The proposed S.555 was amended prior to its enactment. The new (and now current) language allowed pull tabs, lotto, punchboards, tip jars, instant bingo, and other games similar to bingo to be classified as class II gaming only if played at the same location as bingo. Senator Domenici made the following statement: "Mr. Chairman, I want to thank you for including an amendment to clarify that lotto games are played only at the same location as bingo games which are class II games under the bill. I believe there are other Senators who have questioned whether lotto and lotteries are interchangeable terms. This Amendment makes it clear that they are not and that traditional type lottery games are indeed class III." 134 Cong.Rec. at S24023 (daily ed. September 15, 1988). Later in the proceedings, Senator Burdick, noted his pleasure that "the issue of whether tribes can operate statewide lotteries without a tribal/state compact has been resolved in the Committee amendments." 134 Cong.Rec. at S24028 (daily ed. September 15, 1988). The Commission's disparate treatment in the Proposed Rule of bingo and the Sub-games to bingo (*e.g.*, pull-tabs, lotto, instant bingo, and other games similar to bingo) is contrary to the Congress' expressed legislative intent in the IGRA.

[128] *See* Senate Report, *supra*, at 3081-82 ("In the other 45 States, *some forms* of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill," emphasis added).

[129] The Senate Report provides:

> Section (4)(8)(A)(ii) [codified at 25 U.S.C. §2703, subd. (7)] also makes clear the Committee's intent that pull-tabs, punch boards, tip jars, instant bingo and similar sub-games may be played as integral parts of bingo enterprises regulated by the act and, as opposed to free standing enterprises of these sub-games, *state regulatory laws are not applicable to such sub-games, just as they are not applicable to Indian bingo.*

Senate Report, *supra*, at 3079 (emphasis added).

many extra-statutory limitations on the *method of play* of class II bingo-related gaming in much the same way that various (but not all) states have imposed limitations on the method of play of state authorized bingo.[130] The extra-statutory limitations in the Proposed Rule on the method of play constitute an impermissible imposition of state-regulatory mechanisms on tribal class II bingo and appear to represent an effort to undo numerous pre-IGRA cases, culminating in *California v. Cabazon Band of Mission Indians*, in which the Supreme Court held such state regulatory limitations on tribal bingo operations to be invalid.

An agency must follow established judicial precedent.[131] The Commission's interpretations in the Proposed Rule, as written, will be assessed against the settled law.[132] A court's interpretation of a statutory provision trumps an agency's later interpretation that is inconsistent with the court's precedent, particularly when the court's interpretation is not based on deference to the agency's interpretation.[133] The agency is not entitled to deference by the courts if the statute is clear (or its intent is evidenced by the statute's legislative history), or if the agency's interpretation is unreasonable.[134]

Here, the Commission attempts to define permitted technology by defining the permitted games. Congress defined the games included as class II gaming under the IGRA and allowed for technology to be used as aids to those games. To the extent that binding judicial precedent exists, as is the case here, the agency must follow the judicial precedent. To the extent the wording of the statute is clear, or is made clear by the legislative intent, as is also the case here, that is the end of

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[130] If the NIGC wishes, we would consider supplementing these comments with a discussion of various state law definitions of bingo and lotto (which range from mere statements allowing the game of "bingo" to detailed definitions including specific requirements as to card design, technology limitations, pattern design, numbers of objects having specified characteristics, rate of play of specified characteristics, prizes of specified characteristics and limitations, and specified methods of play including but not limited to house "sleep" rules and covering rules) and for games of pull-tabs, punchboards, tip jars, instant bingo and similar games (for which state law definitions also vary from mere authorizing statements to detailed definitions including specific requirements as to card design, technology limitations, prize limitations, and method of play). The state law definitions for bingo indicate a wide variety in bingo gaming. *See, e.g., People v. 8,000 Punchboard Devices*, 142 Cal.App.3d 618, 621-22 (Cal.Ct.App. 1983) (in a dispute over whether an instant bingo game played on punch cards was outside of a constitutional amendment authorizing bingo for charitable purposes, the court held that the instant bingo game was within the scope of the term 'bingo;' the court conducted an extensive review of bingo games and noted that "[v]arious sources indicated, however, that the term 'bingo' may include any number of different but related games" and that after hearing extensive evidence about the variations of bingo the court concluded that "[n]o common meaning of the term bingo emerges"). The literature surrounding bingo gaming also reveals an amazing breadth as to the games that fit within the definition provided by the Congress in the definition of class II bingo gaming. After five years of proposed legislation, hearings, and debate on proposed legislation, culminating with the enactment of the IGRA, Congress was assuredly clear as to the definitions provided in the IGRA for class II gaming. Instead of intending that class II bingo be limited by the use in the statute of the phrase "the game of chance commonly known as," found at 25 U.S.C. §2703(7)(A)(i), it is clear that Congress intended that the statutory definitions provided in the IGRA for class II bingo gaming constitute a wide variety of games available to tribes as class II gaming free from state interference. The effect of the Proposed Rule, with each of its many individual extra statutory definitional requirements, will be to exclude a wide variety of games that Congress intended as class II bingo gaming.

[131] *See e.g. Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997); *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991).

[132] *See Neal v. United States*, 516 U.S. 284, 295 (1996); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

[133] *Banker's Trust New York Corp. v. United States*, 225 F.3d 1368 (Fed.Cir. 2000), *citing, Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988).

[134] *See* nn. 34, 106-108, and, 114-129, and accompanying discussion.

discussion for the agency. Further, ambiguities in a statute dealing with Indians are to be construed in favor of the tribe. That rule of law, read in conjunction with Congress' intent that tribes have flexibility in both game design and use of technology, two separate issues, and Congress' intent that the NIGC be an agency of limited authority to avoid unnecessary infringement of tribal rights, a third issue, requires a minimalist approach, as adopted by prior Commissions, to any definitional regulations implementing the express definitions in the IGRA.

The Commission's Proposed Rule violates binding judicial precedent and the IGRA. Congress did not delegate authority to the Commission to adopt legislative or pervasive regulations. Congress did not delegate authority to the Commission to alter the jurisdictional framework established by Congress in the IGRA.[135] The Commission's Proposed Rule is arbitrary, capricious, and manifestly contrary to the law.

The Proposed Rule also represents a radical departure from prior positions of the Commission on which tribes and others have relied. The Commission first adopted definitions regulations in 1992.[136] Although tribes (and some of the Commissioners) did not agree with all of the definitions implemented by the Commission, the 1992 definitions regulations reflected a recognition by the Commission that, in the case of definitions regulations, less is more. This regulatory approach was and is consistent with Congress' intent, again, that tribes "have maximum flexibility to utilize games such as bingo and lotto for tribal economic development."[137]

A key issue raised in the Commission's Proposed Rule is that the definition of class II bingo games, and related technology, included in the Proposed Rule is so detailed that in essence technology and game design will be frozen at pre-2004 levels, or the point at which the Commission came to the consultation table with what the Commission intended ultimately to be the current Proposed Rule. By its nature, a detailed definition excludes everything not within the definition. A fair read of the IGRA is that Congress left open the options available to tribal governments as to game design for class II bingo gaming, and related technology, so as to be consistent with Congress' stated intentions for the IGRA allowing for further advances in game design and technology in connection with class II gaming. Accordingly, when the Commission adopted its original definition regulations in 1992 (which definitions, again, were not perfect), the Commission wisely concluded that "Congress enumerated those games that are classified as class II gaming activity (with the exception of 'games similar to bingo'). . . adding to the statutory criteria would serve to confuse rather than clarify" and "the Commission believes that the rule

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[135] Each of the games, and the catch-all category of "games similar to bingo," addressed in the Proposed Rule are specifically enumerated in the IGRA. Therefore, the resulting deference to the agency applied by the court in *Shakopee Mdewakanton Sioux Community, supra*, 16 F.3d 261, in response to a challenge to the NIGC's decision to classify keno as class III gaming does not apply here. In *Shakopee*, the court noted that "keno was rarely mentioned during congressional deliberations, and nothing in the legislative history evinces a clear congressional intent with regard to the classification of keno under the statute." *Id.*, at 264.

[136] Final Rule, *supra*, 57 Fed.Reg. 12383.

[137] Senate Report, *supra*, at 3079.

published today provides ample guidance to anyone who needs to classify a game under the IGRA."[138]

In 1999, the Commission issued a proposed rule on the classification of games played under the IGRA.[139] That 1999 proposed rule, if adopted by the Commission, would have provided that (a) "tribes shall not offer games on Indian lands without a classification decision which concludes that the game is a class II game unless the game is offered pursuant to a tribal-state compact or class III gaming procedures issued by the Secretary of the Interior," (b) "a classification decision is a determination that a game falls within class II or III" obtained from the Chairman of the Commission, and (c) "tribes are subject to enforcement action by the Chairman if they offer games as class II without a classification decision."[140] The proposed rule from 1999, similar to the Proposed Rule, violated tribal sovereignty and was contrary to the IGRA.

As the Commission itself recognized, the proposed rule from 1999 was widely criticized including on the grounds that (i) "the rule failed to recognize that the Commission shares responsibility for the regulation of class II gaming with tribal governments . . . the process minimizes the role of tribal gaming commissions in making classification decisions in the first instance," (ii) "the rule was far too sweeping in that no game, even those games unquestionably falling within the class II criteria, could be introduced for play without first receiving a classification decision from the Commission," and, (iii) "the Commission's capacity to produce decisions under the rule would be overwhelmed by the sheer volume of the workload."[141]

The Commission subsequently withdrew the 1999 proposed rule but noted that "the commission recognizes that its lack of a uniform process for making gaming classification decisions fosters a climate of uncertainty, exacerbating disputes and increasing the likelihood of long, drawn out litigation,"[142] "the proposed rule would have more likely satisfied the concerns of all if there had been greater opportunity for tribal input during its development," and, "if at a future time, the Commission reconsiders promulgation of a rule establishing a formal procedure for the classification of games, a tribal advisory committee should be established to advise the Commission as to the nature and content of such a rule."[143]

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[138] Final Rule, *supra*, 57 Fed.Reg. 12382.

[139] 64 Fed.Reg. 61234 (November 10, 1999).

[140] *Id.*

[141] Proposed Rule Withdrawal, 67 Fed.Reg. 46134 (July 12, 2002).

[142] The difficulties to be experienced by the regulated community by the NIGC inserting itself into classification decisions were presaged by the NIGC's preamble to the 1992 definitions which states: "Some commenters suggested that the Commission evaluate certain games to determine whether they are games similar to bingo. In the view of the Commission, the final rule provides a simple test; therefore, there is no need to provide evaluations for most games. For new games, however, the Commission may provide advisory opinions before those games are offered for play in a class II gaming operation." Final Rule, *supra*, 57 Fed.Reg. 12383, 12387.

[143] *Id.*

In addition to violating the jurisdiction of tribal gaming commissions (and tribal governments), the proposed "procedural" game classification rule from 1999 would have created an untenable regulatory situation as it relates to the efforts by tribes in several states to negotiate tribal-state compacts for class III gaming. Tribes located in a state that has refused to negotiate in good faith for a class III tribal-state gaming compact would potentially have been placed at a disadvantage with respect to the regulations. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (invalidating the cause of action provided by Congress in the IGRA in favor of tribes when a state refuses to negotiate in good faith for a class III gaming compact and the state does not consent to suit). The same is true with respect to the Proposed Rule which is in essence nothing more apparently than an attempt by the Commission to resurrect, with the same effects, the withdrawn 1999 proposed rule.[144]

The withdrawal by the Commission of the 1999 proposed rule came at about the same time in 2002 as the Commission adopted amended definitional regulations for the meaning of "electronic, computer, or other technologic aid," "electronic or electromechanical facsimile," and "other game similar to bingo" which are presently found at 25 C.F.R. §§502.7, 502.8, and 502.9.[145] The stated goal of the Commission in support of the adoption of the 2002 amended definitions was a purported "need" for amending the definition regulations to bring added clarity. The definition regulations amended by the Commission in 2002 in fairness did not effectively address (1) the relationship between the Johnson Act (codified at 15 U.S.C. sections 1171-1178, prohibiting in part the use or possession of gambling devices on Indian lands) and the IGRA's allowance for technologic aids used in connection with class II bingo-related gaming, and, (2) the relationship between class II other games similar to bingo (redefined by the Commission in 2002 as a "variant" of bingo that is not house banked) and lottery games that are class III gaming.[146]

As to the 2002 amended definitions, fortunately the distinction between class II bingo games (which are by definition lottery games that Congress specifically made class II gaming under the IGRA), and class III lottery games, has previously been addressed in a series of court cases and otherwise addressed by the Commission in the 1992 definitions regulations.[147] The relationship

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[144] The Secretary of the Interior is required under the IGRA to review and approve (or disapprove) compacts for class III gaming negotiated between tribes and states. *See* 25 U.S.C. §2710(d)(8). The Secretary has previously approved of class III gaming compacts that include excessive revenue sharing and other payments to states and their subdivisions in amounts never intended by the Congress in the IGRA thereby creating at the least an implied complicity between the Executive Branch and various states of a continued undermining of the important rights reaffirmed by the Congress in the IGRA as existing in tribes of self-determination, strong tribal government, and vital tribal governmental economic development activity through tribal gaming activities.

[145] Final Rule, *supra*, 67 Fed.Reg. 41166 (June 17, 2002).

[146] The 2002 definitional regulations also provided regulatory support for some but not other gaming activity which under the IGRA, its legislative history, and case law is class II gaming. One direct fall-out of the 2002 definition regulations was a further weakening, contrary to the law, of the legal support in the IGRA for the play of pull-tab and similar games in connection with class II bingo-related gaming.

[147] *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757 (7th Cir. 1991) (defines game of lotto as included in the IGRA as class II gaming); *Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992) (defines game of lotto under the IGRA); *Shakopee Mdewakanton Sioux Community v. NIGC*, 16 F.3d 261 (8th Cir. 1994) (distinguishes keno from a game similar to bingo); *see also* 25 C.F.R. §§502.3 (defines class II gaming), 502.4 (defines class III gaming), 502.7 (defines aids), 502.8 (defines facsimiles), 502.9 (defines other games similar to bingo), and 502.11 (defines house banking games). As in the comments to the Proposed Rule submitted for the Tribe on August 15, 2005, we do not have a

between the Johnson Act and the IGRA has also been addressed in a series of prior court cases.[148] Again, there is no demonstrated need for additional definitions or classification standards regulations including as provided in the Proposed Rule.

As indicated above, the Proposed Rule places arbitrary (outside of the language of or the intent in the IGRA) limitations on the variety of lottery games that may be played as class II bingo-related gaming. The standards in the Proposed Rule are so restrictive that even older, recognized electronic bingo games such as MegaMania and Wild Ball Bingo may not qualify.[149] The Proposed Rule further places arbitrary and disparate limitations on the play of the Sub-games of bingo including pull-tabs and instant bingo,[150] including by the requirement in the Proposed Rule that pull-tab and instant bingo games use only paper cards.[151]

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strong objection to removing the term "house banked" from the definition of "game similar to bingo." However, we do not believe that single change would warrant the whole scale revision to definitions of class II gaming envisioned by the Proposed Rule.

[148] *See e.g., United States v. 103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1102 ("while complete, self-contained electronic of electromechanical facsimiles of a game of chance, including bingo, may indeed be forbidden by the Johnson Act after the enactment of IGRA . . . we hold that mere technologic aids to bingo . . . are not"); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000) ("We further conclude Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid"); *Seneca-Cayuga Tribe of Oklahoma v. NIGC, supra*, 327 F.3d 1019, 1035 ("we hold that if a piece of equipment is a technologic aid to an IGRA class II game, its use . . . within Indian country is then necessarily not proscribed as a gambling device under the Johnson Act . . . If a piece of equipment is an IGRA class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a 'gambling device' proscribed by the Johnson Act"); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (holding "Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games under the IGRA . . . Thus, the IGRA makes 15 U.S.C. §1175 . . . inapplicable to class II bingo and lotto gaming"), *aff'd sub nom., United States v. Cook*, 922 F.2d 1026 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991); *cf., United States v. Santee Sioux Tribe of Nebraska, supra*, 324 F.3d 607 (stating that "the argument that the IGRA implicitly repeals the Johnson Act with respect to class II devices is not well taken, even though some version of this view has been expressed by several courts," concluding that "the Tribe must not violate either act," and then holding that an electromechanical dispenser of pull-tabs was lawful class II gaming). A full discussion of the relationship between the IGRA and the Johnson Act is beyond the scope of this statement and is further rendered difficult by the uncertain status of the DOJ's present legislative proposal.

[149] As to such older games, most of the technology used with such games would be unlikely to satisfy the Commission's separately proposed Technical Standards Regulations for equipment used with class II gaming, meaning that the cumulative effect of the Commission's regulatory initiatives as to class II gaming would essentially require tribal governments to start over completely with respect to class II gaming.

[150] The confusion in the Proposed Rule appears to be the NIGC's proposed application in its proposed definition of "facsimile" of a standard based on "formats," as compared to a standard based on "devices" as provided in the IGRA. The IGRA did not exclude certain formats, *i.e.*, electronic formats, from the definition of class II gaming. *See* 25 U.S.C. §2703(7)(B).

Although it may be tempting for the NIGC to read section 2703 as carving out from class II electronic formats, as well as devices, it is clear that all Congress meant to exclude from class II gaming were mechanical slot machines and their functional self-contained electronic equivalents, *i.e.*, devices. The focus in the IGRA, as to the carve-outs from class II gaming, is not on "formats" but instead on certain "devices." 25 U.S.C. §2703(7)(B)(ii) (removing from class II gaming a hierarchy of devices including "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind"); 25 U.S.C. §2710(b) (providing that tribes may engage in class II gaming if "such gaming is not otherwise specifically prohibited on Indian lands by Federal law"); Senate Report, *supra*, at 3082 (the phrase not otherwise "prohibited by federal laws" refers to "gaming that utilizes mechanical *devices* as defined in 15 U.S.C. §1175" and "It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal *devices* used solely in aid of or in conjunction with bingo or lotto or other such gaming . . . The Committee specifically notes the following sections . . . 18 U.S.C. . . . and except as noted above . . . 15 U.S.C. 1171-1178," emphasis added); Senate Report, *supra*, at 3079 (distinguishing technology that constitutes an aid from technology that is a facsimile based on one criteria, *i.e.*, "a single participant plays a game with or against a *machine* [*i.e.*, a device] rather than with or against other players," emphasis added); *Id.*, at 3079-80 (noting that the IGRA removes from class II gaming "so-called banking card games and *slot machines*," emphasis added). Moreover, the NIGC itself early on recognized that the carve-out by Congress in the IGRA from class II gaming for facsimiles was appropriately focused on certain devices, *see* 1992 Definitions, *supra*, 57 Fed. Reg. 12382, although the NIGC went too far in the 1992 Definitions by defining "facsimile" as apparently including any gambling device under the Johnson Act in contravention of Congressional intent to exclude from class II gaming only certain devices otherwise subject to the Johnson Act. *Cf. United States v. Burns, supra*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) ("Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games under the IGRA . . . Thus, the IGRA makes 15 U.S.C. §1175 . . . inapplicable to class II bingo and lotto gaming"); *see also103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1101-02 ("while complete, self-contained electronic or mechanical facsimiles of a game of chance, including bingo,

The Proposed Rule includes proposed individual provisions that go to compound concepts as those concepts relate to the classification of the class II game or games in question. As game classification is a game specific determination, global statements made in the Proposed Rule in proposed part 546 as to individual characteristics of class II games with which every game must comply may not properly be applied in the context of specific games. In reviewing the

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may be forbidden by the Johnson Act after the enactment of the IGRA . . . we hold that mere technologic aids to bingo, such as the MegaMania terminal, are not," *citing* then current 25 C.F.R. §502.8 (defining "electronic facsimile" under the IGRA as "any gambling device . . ."), and, *Cabazon Band, supra*, 827 F.Supp. at 31 ("[I]t is plainly evident that IGRA's 'facsimiles' are the Johnson Act's 'gambling devices'")). The law is also clear that the cards used with class II gaming do not, by themselves, constitute devices. *See, e.g., Iowa Tribe of Kansas and Nebraska v. Kansas*, 787 F.2d 1434, 1440 (8th Cir. 1996) (court held that pull-tabs themselves do not constitute gambling devices).

The NIGC essentially seeks in the Proposed Rule to add a new, and extra statutory, definition of facsimile based upon "format," as compared to "device." The additional test now proposed by the NIGC of "format," as included in the Proposed Rule, would not be helpful in clarifying and in fact would be contrary to what the courts have determined to be an unambiguous and consistent statutory scheme.

[151] Neither the IGRA nor the case law requires that all pull-tab and instant bingo games be played with paper cards under all circumstances (or for that matter that any of the other Sub-games to bingo be played with paper cards). *Cf. 162 MegaMania Gambling Devices, supra*, 231 F.3d 713, 724, 725 n.10 (noting that "MegaMania . . . is played with an electronic card that looks like a regular paper bingo card" and that "Having determined that MegaMania is a class II game, we have no reason to go any further, and leave the specific question whether MegaMania is bingo or a 'game similar to bingo' for future resolution"). Nothing in the IGRA or its legislative history supports the NIGC's arbitrary distinction between the Sub-games to bingo for lotto and games similar to bingo, for which the NIGC in the Proposed Rule allows the use of electronic cards, and the other Sub-games to bingo such as pull-tabs or instant bingo, for which the NIGC seeks to prohibit the use of electronic cards. *See* 25 U.S.C. 2703(7)(A)(i) (making all of the Sub-games to bingo class II gaming merely if "played at the same location"). Contrary to the NIGC's position in the Proposed Rule, the legislative history supports the use of electronic cards for all of the Sub-games to bingo. *See* Senate Report, *supra*, at 3079 (as to the IGRA's allowance for "maximum flexibility" in the use of technology for class II gaming, the "Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues . . . For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take"). Linking and coordination between gaming facilities is not possible if tribal governments are limited to paper cards for class II gaming.

The cases apparently relied upon by the NIGC in support of the Proposed Rule do not support a global requirement that all pull-tab and instant bingo games use paper cards. *See Cabazon Band, supra*, 14 F.3d 633, 636 (noting that "whatever might be said about the breadth of the regulations with respect to other games, 'without a doubt' computerized pull-tab games of the type involved here 'clearly are facsimiles of games of chance,'" and noting that with respect to "'communications technology that might be used to link bingo players in several remote locations' . . . That sort of technology is, as the [Senate] Report itself recognizes, distinguishable from electronic facsimiles of the game itself," *citing, Spokane Tribe of Indians v. United States, supra*, 972 F.2d 1090, 1093 (the Ninth Circuit concluding that with respect to the Pick Six lottery terminal that "a single player picks six numbers and tries to match them against numbers picked by a computer . . . The player can participate in the game whether or not any else is playing at the same time . . . Rather than broadening potential participation . . . Pick Six is an electronic facsimile in which a single participant plays against the machine . . . it cannot be classified as a class II gaming device)); *Sycuan Band, supra*, 54 F.3d 535, 542-43 (holding that the subject "game at issue here", *i.e.*, the "Autotab Model 101 electronic pull-tab dispenser" (a self-contained unit containing a computer linked to a video monitor and a printer within which unit a computer-chip cartridge insures a predetermined and known number of winning tickets from a finite pool of tickets with known prizes), to constitute a class III facsimile, and against the operator's argument that "the player plays not against the machine using random odds, but against other players in a closed board," the court concluding "the pull-tab machines have the effect over time, perhaps, but any given player is faced with a self-contained machine into which he or she places money and loses it or receives winning tickets after the electronic operations are concluded . . . In that sense, the gambler plays 'with the machine' even though not against it"). The cases relied upon by the NIGC in the Proposed Rule are early cases involving self-contained facsimiles, *i.e.*, devices, and those cases are now stale and of significantly diminished precedential value. The rulings in those early cases were limited to the old technology specifically at issue in those cases. New technologies are available which allow the play of electronic pull-tab games with technologic aids as class II gaming under the rationale of the MegaMania court decisions (including without limitation pull-tab games in which unlike the games in *Cabazon* and *Sycuan* one player cannot play the pull-tab game alone, in which either paper or electronic cards may be used, in which the player and not the device plays the game, and in which the element of chance, *i.e.*, the creation of the deal of pull-tabs, is not present within the device with which the game is played). *Cf. 103 Electronic Gambling Devices, supra*; *162 MegaMania Gambling Devices, supra*. By limiting all pull-tab and instant bingo games to paper cards, the NIGC is again changing the definitions for class II gaming, and thereby the jurisdictional framework, provided by the Congress in the IGRA.

classification of a game under the IGRA, the entire game, not just one of its components, should be considered.[152]

The question of what is an allowed class II game is different than what technology is permitted with an allowed class II game. Game classification under the IGRA is based on the answer to two questions: (1) is the game one of the games included by Congress as class II gaming, and, (2) if the game uses technology, is the technology merely an aid (class II gaming) or a facsimile or slot machine (class III gaming). These questions necessarily follow from the structure and express wording of the definitions included in the IGRA.[153] By mixing concepts of definitions of permitted games with definitions of permitted technology, as the Commission has done in the Proposed Rule, the Commission will bring greater uncertainty to the issue of game classification.

Many of the requirements in the Proposed Rule go to operational, marketing, security and other unrelated issues, *i.e.*, issues that do not affect game classification.[154] For example, and without limitation, we note that the Proposed Rule in proposed part 546 improperly purports to include requirements for class II gaming as to method of play, card design, prize limitations, and display design. The Proposed Rule does not add clarity to the definition of class II bingo-related gaming and, if adopted as a regulation, is likely to result in few games (and possibly not even the games on which the courts have already favorably ruled or those few games for which the Commission has already issued favorable advisory opinions or the games) surviving as viable class II gaming.

The Proposed Rule appears founded in part on a mistaken analysis that because Congress defined class II bingo to include both the "game of chance commonly known as bingo," and "other games similar to bingo," that a separate definition is required for both types of "games." The courts have made clear that Congress' intent was to include a catch-all category for bingo games to avoid disputes between tribal and non-tribal agencies that a game was properly included in class II gaming.[155] The use by Congress of the catch-all category was not intended to require a detailed definition of both the defined "game of chance commonly known as bingo" and the catch-all

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[152] *United States v. 103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1098 ("The question before us, though, is whether *MegaMania*, not one of its constituent parts, satisfies IGRA's statutory criteria for class II gaming . . . Thus, MegaMania *as a whole* is "the game" to which Section 2703(7)(A)(i)(III) pertains"). For this reason, among others, the definitions in the Proposed Rule for Sections 502.8 and 502.9, and proposed part 546, are arbitrary, capricious, and contrary to law. To constitute class II bingo gaming under the IGRA, not every class II game using technology must meet all of the many detailed requirements to be imposed by the Proposed Rule. We do not believe, based upon the text, structure, and legislative history of the IGRA, and the important tribal rights involved, that Congress intended for the NIGC to pre-adjudicate and thereby exclude by regulation games that are within Congress' definition of class II gaming.

[153] *See* 25 U.S.C. §2703.

[154] *See* Final Rule, 57 Fed.Reg. 12382 ("such considerations are marketing decisions and outside the Act's purview" and "Several commenters suggested that, if the operational characteristics and security demands of a game are similar to those for bingo, those qualities should weigh heavily in determining whether the game is indeed similar to bingo . . . The Commission believes that Congress did not intend other criteria [besides the criteria in the statute and the 1992 definitions] to be used in classifying games in class II").

[155] *Cf. 103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096 ("Moreover, §2703(7)(A)(i)'s definition of bingo includes "other games similar to bingo . . . explicitly precluding any reliance on the exact attributes of the children's pastime").

category of games included in the term "other games similar to bingo" so as to force an arbitrary distinction between two sets of related and similar games.

The Commission is correct in maintaining a distinction between class II and class III gaming because of the jurisdictional limitations imposed by Congress on class III gaming (that of generally requiring a tribal state compact or Secretarial procedures). To maintain the distinction between class II and class III gaming made by Congress, the Commission's focus in connection with the Proposed Rule might be more appropriate if shifted to defining the distinctions between class II "other games similar to bingo" and class III lottery games. In other words, the Commission might more appropriately seek to make clearer what does not constitute a "game similar to bingo" as in the case of a live game, not played with pre-vested cards, in which the method of play is the same as for games played by state lotteries. These distinctions could be stated, based upon existing judicial precedent and Commission regulations, in a few short requirements, not in the many pages and detailed requirements of the Proposed Rule.

Or, as the distinctions between class II and class III lottery games have already been addressed by the courts, a fair question exists as to the need for any additional definitions regulations. The Commission, in implementing its existing regulations, could simply follow the judicial precedent, or to the extent the Commission feels a need to provide guidance to the tribes as to the Commission's interpretations and enforcement policies, the Commission could simply issue a bulletin.

In any event, a fair read is that the Commission is apparently attempting in the Proposed Rule to accomplish what the Commission failed to accomplish with the 1999 proposed rule on a procedure for game classification decisions by the Commission. The Proposed Rule includes a very detailed description of games "allowed" (in the eyes of the Commission) as class II gaming. The Proposed Rule then requires all tribal governments to institute a compliance program that would require an independent testing laboratory, approved by the Commission, to certify that each game played by the tribe as class II gaming meets the detailed definition included in the Proposed Regulations. In essence, the Commission is attempting to "approve" in advance the games that tribes may offer as class II bingo gaming by imposing a very detailed definition of those games by regulation. The Proposed Rule is no less objectionable than the 1999 proposed rule which the Commission wisely abandoned.[156]

A concern we have with the Proposed Rule is that it fails to resolve the basic problems associated with the Commission's existing game classification process. One such problem is that there effectively is no procedure for appeal with respect to individual games outside the enforcement

[156] Our concerns are based in part on the separate Request for Proposal ("RFP") issued by the NIGC in December 2003 for a paid contractor to actually write the regulations on class II gaming that the Advisory Committee is to "bless." Based on the RFP, the NIGC apparently proposed with the help of the paid contractor to adopt new regulations establishing (1) definitions of class II gaming, (2) a procedural rule akin to the rule proposed by the NIGC in 1999 but subsequently withdrawn requiring all games to be classified by the NIGC before the games may be played in tribal gaming facilities, and, (3) enforcement procedures.

context, a framework that avoids judicial oversight and violates fundamental principles of fairness and due process of law. As the primary regulators of Indian gaming, tribal governments should be able to challenge a game classification opinion by the Commission on a government-to-government basis, without first having to risk enforcement action.

Not only does the Proposed Rule fail to address this problem, but it actually compounds it by outsourcing the classification process from tribal regulators and the Commission to private sector gaming laboratories. Nothing in the IGRA suggests that testing laboratories should be placed in the position of interpreting the IGRA. Instead, their role should be limited to ensuring the integrity of equipment and operating systems through objective techniques. The process set forth in the Proposed Rule not only deprives tribal regulators of their legitimate regulatory authority over Indian gaming, but also relinquishes a critical federal responsibility to the private sector and deprives tribal governments of appropriate due process of law.

III. Technical Standards Regulations.

A. Overview.

The Technical Standards Regulations are objectionable for many reasons including without limitation: (a) the Technical Standards Regulations violate the inherent sovereignty retained by the Miccosukee Tribe of Indians of Florida and other tribal governments; (b) the Technical Standards Regulations represent an unsupportable assertion of authority by the Commission contrary to the Commission's authority as delegated by the Congress under the IGRA and the Technical Standards Regulations violate the jurisdiction of tribal agencies and the authority of Congress; (c) the Technical Standards Regulations violate the IGRA; (d) the Technical Standards Regulations will cause substantial uncertainty in the regulation of tribal gaming; (e) inadequate consultation occurred with the Tribe,[157] including as to the need and purpose of the Technical Standards Regulations; (f) against the backdrop of inadequate consultation, the Commission apparently came to the table with a pre-conceived rule (or at least the essential elements of the framework for the rule);[158] and, (g) the Commission failed to consider viable and less burdensome alternatives to the Technical Standards Regulations.[159] In connection with the Commission's purported consultation, the Advisory Committee established by the Commission in connection with its drafting efforts as to the Technical Standards Regulations and the interrelated Proposed Rule violated federal laws.[160]

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[157] *See* nn. 172 to 183 and accompanying discussion.

[158] *Id.*

[159] *See* n. 184 and accompanying discussion.

[160] *See* nn. 172 to 183 and accompanying discussion.

B. The Commission is an Agency of Limited Authority and Lacks the Authority to Promulgate or to Enforce the Technical Standards Regulations.

The powers of the Commission are as established in the IGRA. As discussed in these comments, the Commission's role under the IGRA is primarily one of oversight to see that a tribal government implements the "federal standards" set out in the tribe's gaming ordinance. The Commission was given other certain limited powers for class II gaming such as management contract review and approval, establishment of fees and assessment of fines, granting of certificates of self-regulation, *etc.*, and there is no question that the Commission has a "regulatory role" with respect to class II gaming.

However, as a review of the language, structure, purpose, and legislative history of the IGRA makes clear,[161] the role of the Commission is not one of altering the jurisdictional framework in the IGRA, or one of developing and imposing detailed regulations on Indian gaming as provided in the Technical Standards Regulations *in lieu* of tribal government decisions on the regulation of such gaming,[162] but one of limited "oversight" of each tribal government's own regulatory efforts under its tribal gaming ordinance and the provisions contained in the IGRA. Respectfully, the Commission can implement the IGRA, but the Commission cannot change the IGRA as the Commission would do with the Technical Standards Regulations.

1. The Commission's Oversight Role under the IGRA Does Not Include the Authority to Impose Detailed and Pervasive Regulations of the Type Included in the Technical Standards Regulations.

a. The IGRA Does Not Grant the Commission the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Technical Standards Regulations.

The IGRA contains no express grant of authority to the Commission to promulgate pervasive regulations as to the regulation and operation of tribal gaming activities. Here too, the fact that Congress did not expressly negate the authority of the Commission does not create an ambiguity in the statute allowing the Commission to move forward with the Technical Standards Regulations. An agency has no power to act "unless and until Congress confers power upon it."[163] *The power apparently claimed by the Commission in the Technical Standards Regulations* to promulgate pervasive regulations for the operation and regulation of tribal gaming activities *is further contradicted by the express wording of the IGRA*. Beyond the Commission's approval authority for tribal gaming ordinances, and its approval authority for management contracts, the bulk of the

[161] *See* nn. 18 to 103, *supra*, and accompanying discussion.

[162] *Id.*

[163] *See* n. 39, *supra*, and accompanying discussion.

Commission's authority for class II gaming resides in the monitoring of and enforcement as to the efforts of tribal governments to comply with the provisions of their tribal gaming ordinances and the IGRA. Quite simply, the powers of the Commission under the IGRA of monitoring and enforcement do not equate with an authority, as assumed under the Technical Standards Regulations, of promulgating still additional standards for tribal governments to comply with so as to give the Commission still more to monitor and enforce.[164]

b. The Structure of the IGRA Reveals that the Commission Lacks the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Technical Standards Regulations.

The structure of the IGRA reveals that the Commission lacks the authority to promulgate detailed or pervasive regulations as to the operation of class II gaming of the type included in the Technical Standards Regulations.[165] The Congress provided in the IGRA for standards of operation for tribal gaming in only two areas. First, the issue of operating standards was made by Congress a valid subject for negotiations between tribal governments and states for class III tribal-state gaming compacts.[166] Second, the issue of operating standards are included among the "federal standards" required as to tribal gaming ordinances including as to class II gaming.[167] Neither provision in the IGRA, *i.e.*, as to tribal-state compacts for class III gaming, or tribal ordinances including for class II gaming, mentions or implies any significant involvement by the Commission in developing the actual standards of operation for tribal gaming. Although the Commission has oversight for a tribe's compliance with its gaming ordinance, that oversight does not amount to a power to promulgate terms in addition to the terms required by the IGRA with respect to tribal gaming ordinances. Other provisions in the IGRA also portend a limited role for the Commission that is at odds with the assumption of authority undertaken by the Commission in the Technical Standards Regulations.[168]

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[164] *Cf. Colorado River Indian Tribes v. NIGC*, *supra*, 383 F.Supp.2d at 135, n. 8 ("the power to investigate and enforce does not also imply the authority to create new rules for the agency to investigate and enforce").

[165] *See* nn. 82 to 83, *supra*, and accompanying discussion.

[166] 25 U.S.C. §2710(d)(3)(C) (includes among the authorized topics for a tribal-state compact for class III gaming "standards for the operation of such activity and the maintenance of the gaming facility, including licensing"); *see also* 25 U.S.C. §2710(d)(7)(B)(vii) (provides that when a state and a tribe cannot agree on a tribal-state compact for class III gaming that the Secretary can step in to "prescribe . . . procedures . . . under which class III gaming may be conducted by the tribe).

[167] *See* 25 U.S.C. §2710(b)(2)(E) and (F) (includes among the "federal standards" for tribal gaming ordinances a requirement that the ordinances provide "the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety," and, "there is an adequate system which . . . ensures . . . that oversight of such officials and their management is conducted on an ongoing basis"). The Proposed Rule calls into question the prior approvals by the Commission of countless tribal gaming ordinances for tribal gaming.

[168] For example, the IGRA provides for limited funding for the Commission. 25 U.S.C. §§2717 and 2718. Second, the implication in the IGRA as originally enacted was that the Commission would meet "at least once every 4 months" and that the associate commissioners might not serve on a full-time basis. 25 U.S.C. §§2704(f) and 2706(c)(1).

c. The Legislative History of the IGRA Reveals that the Commission Lacks the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Technical Standards Regulations.

A review of the proceedings and the various legislation proposed and considered by the Congress over a five year period prior to the enactment of the IGRA makes clear that the Commission does not have the authority to adopt pervasive regulations[169] including as provided in the Technical Standards Regulations. In fact, a thorough review of the consideration by the Congress of Indian gaming legislation during that period leading up to the enactment of IGRA reveals that each of several legislative attempts to provide extensive regulatory authority in the states or in federal agencies over tribal class II gaming was rejected by Congress.

The powers assumed by the Commission in the Technical Standards Regulations do not appear in and were not authorized by the Congress under the express terms of the IGRA. The secondary stated purpose of the IGRA, *i.e.*, to provide for "federal standards," refers to the standards stated in the statute. The power of the Commission to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter," as provided for at 25 U.S.C. section 2706, subdivision (b)(10) (referring to only the provisions of the Act codified in Title 25, Chapter 29), refers only to the limited oversight role of the Commission and not to an authority to promulgate additional extra-statutory limitations on the regulatory authority of tribal governments. The Commission is charged with executing the substantive provisions, or standards, of the IGRA as written by Congress, but the Commission does not have the authority to change the IGRA as provided in the Technical Standards Regulations. Again, an agency is owed no deference when the subject matter of the agency's action is not within the authority delegated to the agency by the Congress.

2. The General Purposes of the IGRA Do Not Grant the Commission the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Technical Standards Regulations.

The Commission cannot properly, and should not, rely upon the general purposes of the IGRA to support an ever increasing role for the Commission in the oversight regulation of tribal gaming including as provided in the Technical Standards Regulations.

First, the general purposes of the IGRA, and its substantive provisions, do not support the Technical Standards Regulations. Second, several oversight and legislative hearings have been held since 1988 by committees of the Congress on the implementation of the IGRA and on Indian gaming in general. These oversight and legislative hearings have demonstrated the clear, post-IGRA understanding of the limited scope of the Commission's authority over class II gaming.

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[169] *See* nn. 84 to 94, *supra*, and accompanying discussion.

Representations made by the Commission in these oversight hearings contained explicit denials of power in the Commission to promulgate and enforce pervasive class II gaming regulations such as the Technical Standards Regulations.[170] Representations made by the Commission in these prior oversight hearings also demonstrated the Commission's recognition and understanding of a difference in type and degree of regulation, *i.e.*, between that of oversight as intended and provided by the Congress in the IGRA and the type of pervasive regulation envisioned now by the Commission in the Technical Standards Regulations.

The requirements, as contemplated by the Technical Standards Regulations, of certifications prior to the play of class II technology, represent an improper back-door attempt by the Commission to regulate the issues raised in the Technical Standards Regulations (and in the intertwined Proposed Rule) and improperly intrude upon tribal sovereignty and matters or decisions reserved for tribal governments under the wording and structure of the IGRA, *i.e.*, on matters already addressed by the Congress in the IGRA. The combination of certifications and detailed classification standards in the Technical Standards Regulations represents a pre-condition not authorized in the IGRA to a tribal government's decision to engage in and then to regulate and operate gaming. The attempted assumption of jurisdiction by the Commission in areas for which jurisdiction has not been authorized by the Congress will lead to increased tensions and confusion between tribal governments and the Commission.

The Technical Standards Regulations are not a valid exercise of the provision in the IGRA appearing to authorize the Commission to "promulgate such regulations and guidelines as it deems proper to implement the provisions of this chapter." An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority. Agencies such as the Commission are "bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate and prescribed, for the pursuit of these purposes." Here, Congress provided not only the purposes of the IGRA but also the means to accomplish these purposes through the "statutory basis for the regulation of gaming by an Indian tribe" provided in the IGRA. The Technical Standards Regulations do not comport with the means selected by the Congress for effectuating the purposes of the IGRA.

The Commission lacks the statutory authority under IGRA to promulgate, and impose upon tribal governments, the very kind of detailed controls that the Commission is now attempting to adopt in the Technical Standards Regulations. The present Technical Standards Regulations, like the Proposed Rule, goes to the core of the jurisdictional framework imposed by Congress on tribal gaming. On both scores, *i.e.*, overly pervasive regulation and the attempted alteration of the jurisdictional framework in the IGRA, the Proposed Regulations violate the basic rules of federal Indian law and the IGRA. The IGRA does not authorize or support the NIGC's Technical Standards Regulations. The IGRA is clear and unambiguous as to the limited scope of the NIGC's

[170] *See* nn. 97 and 98, *supra*, and accompanying discussion.

authority. Any effort by the NIGC to occupy a regulatory role with respect to the subject matters at hand in the Technical Standards Regulations, is arbitrary, capricious, and contrary to law.[171]

C. Preliminary Comments as to Individual Provisions of the Technical Standards Regulations.

1. Preliminary General Comments as to the Specific Provisions.

The Tribe understands that the Commission is attempting to effect appropriate technical standards that will benefit the class II gaming industry as a whole. While the Tribe believes in the effective regulation of its gaming activities, as discussed above in these preliminary comments the Tribe does not believe that the Technical Standards Regulations are an appropriate vehicle for achieving that goal. The Technical Standards Regulations provide an extreme level of detail. The Technical Standards Regulations contain a number unsupported assumptions, inconsistencies, or impossible requirements. The net effect of the Technical Standards Regulations, as written, will be to specifically limit, preclude, or discourage both old and new technologies. The current provision for variances by tribal regulatory authorities does not overcome the infirmities of the Technical Standards Regulations as currently stated.

Congress intended that tribes have "the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility." The Technical Standards Regulations appear to mandate specific solutions even though more than one solution may be appropriate to the issue addressed. The Proposed Standards are design or implementation specific and overly restrictive. In a number of provisions, requirements are placed on one solution but not on others even though the other solutions would logically require the same requirements for consistency or to achieve the stated objectives.

The document reflects an inherent bias, possibly reflective of the bias in the Proposed Rule. The Proposed Standards do not adequately reflect the growth of the class II gaming industry, or the history and evolution of technology used in connection with the play of class II bingo-related games in the United States. The Proposed Standards provide a number of requirements which to the Tribe's understanding most of the currently installed class II games of many tribes do not meet, nor are these requirements likely to be met in the future.

The Proposed Standards further assume a continuing formal or legal relationship between each tribal government and the various vendors which previously provided equipment to that tribal government's gaming facility. We suspect that in many instances this assumption will turn out not to be the case and that lacking such an ongoing relationship many tribal gaming facilities will not be in a position to go back to their former vendors to obtain all of the material required to be collected and submitted in connection with the certifications required under the Technical

[171] *See* nn. 18 to 103, *supra*, and accompanying discussion.

Standards Regulations. The net effect of the Technical Standards Regulations will likely be a requirement that large numbers of class II games are turned off merely because the required submission items or testing cannot be obtained by the affected tribal governments. Such a result is plainly at odds with the purposes of the IGRA, federal Indian law, and general law. We do not believe that the Commission has the authority to render substantial investments made by tribal governments obsolete in the manner provided by the Technical Standards Regulations.

As is the case with the Proposed Rule, the standards in the Technical Standards Regulations are overly strict and create an appearance that the NIGC is attempting by regulation to allow essentially only one game (and presumably only a few vendors) in class II gaming. As the NIGC's Contractor stated at the meeting of the Advisory Committee in North Carolina, "in the end there will be only bingo, and the focus will only be content." The provisions in the Technical Standards Regulations are anti-competitive.

As the Commission has previously noted, properly, "The Commission believes that Congress did not intend other criteria [operational characteristics and security demands of game] to be used in classifying games in class II." The Tribe respectfully submits, as stated elsewhere in these comments, that the Commission has no authority to, and that Congress did not envision that the Commission would, assume a broad, pervasive, regulatory role as to class II gaming including security, operational, and marketing considerations of the regulation and operation of tribal gaming facilities. The Technical Standards Regulations, including security, reliability, and appropriate customer focused functionality, should be left for tribal governments and the operators of tribal gaming facilities as matters that are fundamentally day-to-day regulatory and operational concerns.

The Tribe also believes that the Technical Standards Regulations as written will require the Commission to continually revisit the technical standards either in the form of requested variances or in the form of future proposed regulations. The Tribe respectfully suggests that the limited resources of the Commission will not permit the Commission to keep up with changes in technology applications in connection with class II gaming. The Technical Standards Regulations as written appear unworkable as a regulation.

A few examples of the Tribe's preliminary specific concerns regarding the Technical Standards Regulations follow. We did not for purposes of economy restate each problematic provision from the many pages of the Technical Standards Regulations. We apologize for any inconvenience to the reader. In some instances, where the intent or meaning of a provision is uncertain, we may have expressed our comment in the form of a question.

2. Preliminary Comments as to Specific Provisions.

The following are preliminary comments and may not include all of the Tribe's comments on the Technical Standards Regulations. The Tribe reserves the right to make other or additional

comments on the provisions indicated below or on any of the other provisions in the Technical Standards Regulations.

Section 547.4 (b). These provisions will likely prove unworkable for many tribal governments with respect to older equipment obtained from vendors with which the affected tribal government no longer maintains an ongoing relationship.

Section 547.4 (c). These provisions will likely prove unworkable for many tribal governments with respect to older equipment obtained from vendors with which the affected tribal government no longer maintains an ongoing relationship. In such a situation, the tribal government will not be able to obtain each of the items required under this subsection, *e.g.*, software, the "signatures," or artwork. Additionally, where a tribal government has only one server, it could not reasonably be required to send its sole server to a testing laboratory along with the communications equipment linking the servers and clients for testing on a regular basis. These requirements, along with others in the Technical Standards Regulations, assume long periods of downtime as existing equipment, or additions to existing equipment, are brought into compliance with the regulations. Provision should be made for the submission of alternate items without need for a variance in the circumstance of alternate means accomplishing the same intended result for existing or similar equipment, *e.g.*, par sheets or mathematical analyses.

Section 547.4 (d). The provision will likely prove unworkable for many tribal governments with respect to older equipment obtained from vendors with which the affected tribal government no longer maintains an ongoing relationship. For smaller facilities, or for facilities having fewer numbers of a particular type of equipment, the retesting as to every piece of equipment is unduly burdensome.

Section 547.5(d). The provision will render obsolete older equipment for which it will not be possible to submit all gaming equipment for certification or to provide that all gaming equipment and software is identical in all respects.

Section 547.6. It is unclear whether every manufacturer's equipment would comply with each of the very specific requirements in this section. If not, these requirements would effectively require tribal governments to obtain their equipment from one or a few manufacturers that are compliant. In this fashion, the proposed regulation creates a monopoly for the manufacturer(s) who happen to comply with the very detailed requirements here.

Section 547.7. The requirements are unduly burdensome. Not all older equipment will likely comply. It is unknown whether older existing equipment or equipment available in the future will comply with subsections (a) and (b). Subsections (c), (d), and (e), (g) and (h) are excessive as to detail (plainly matters for the tribal government in the day-to-day regulation and operation of its gaming activities). Compliance with local electrical codes should be adequate. Not all of these

requirements may be verifiable as to older existing equipment in the field, including as provided in subsection (h).

Section 547.10. Not all equipment will likely comply with subsections (g) and (j). Subsection (j)'s statement of an absolute "upon any loss of power" is unreasonable.

Section 547.11. The provisions in subsection (a), stated as an absolute mandate, are unknowable. The provisions in subsections (b), (c), (d), (e), (f), and (g) are unduly burdensome and unreasonable as to existing older equipment in the field. Subsection (b) is not achievable for older equipment in that the RAM memory of older equipment is typically not mirrored. The critical memory check in subsection (c) in older class II equipment may take place only at time of start-up of a gaming device although typically if critical memory does fail, the gaming devices will not permit further gaming activities without the critical memory. Existing class II equipment in the field is unlikely to comply with the provisions of subsection (d), (e), and (f). The provisions in subsection (d) should only apply in a client-server environment.

Section 547.12. The provision should be changed to allow meters of five digits to address existing equipment in the field. The provision should make clear that the absence of some of the meters listed is acceptable. Not all older equipment in the field will have all of the listed meters.

Section 547.13. The provisions are unduly burdensome and unreasonable. As to older equipment, not all of the listed faults will be detected (*e.g.*, "printer low"), or if the faults are detected the event will be reported with a different message than as indicated in the provision.

Section 547.14. Older existing class II equipment will likely not comply with all of the mandates in this provision. Either the mandate should be removed, or existing equipment provided for through a grandfather provision.

Section 547.15. Older existing class II equipment will likely not comply with all of the mandates in this provision. Either the mandate should be removed, or existing equipment provided for through a grandfather provision.

Section 547.17. These provisions will likely prove unworkable for many tribal governments with respect to older equipment obtained from vendors with which the affected tribal government no longer maintains an ongoing relationship. The contents of the FAC document are purely hypothetical, and it is impossible for a tribal government to predict whether it will be able to comply with the contents for future equipment.

Section 547.20. The provisions in this section are unduly burdensome, unreasonable, and overly detailed. For example, subsection (b)(2) requiring that all unused areas of EPROMS be written with the inverse of the erased state. The provision should provide that its requirements apply only

as applicable, *i.e.*, in the event of game program storage medium that is in fact maintained outside of the actual equipment.

Section 547.21. The provisions in this section are unduly burdensome and unreasonable.

Section 547.26. The provisions in this section are unduly burdensome and unreasonable. The variance provisions should be reworked to make provision (exclusion) for a grandfather provision for existing equipment in the field or to limit the types of deviations from the Technical Standards Regulations for which variances are required.

IV. Inadequate Consultation Occurred on the Proposed Regulations.

We believe that the Proposed Regulations constitute a matter of the utmost importance to the government-to-government relationship between the United States of America and the several Native American Indian tribes within its boundaries. The Proposed Regulations would make illegal the legitimate economic development activities of Indian tribes.[172] The right to engage in these economic development activities represent vested property rights[173] that have been long available to tribes by virtue of their inherent sovereignty.[174] These tribal rights, and moreover the overriding federal interest in protecting these rights, have been clearly acknowledged by Congress including through the IGRA,[175] and by the Executive Branch including through its agencies.[176]

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[172] The Proposed Regulations would dramatically limit the scope of class II gaming presently available to tribal governments. By estimates made by representatives of the NIGC at recent gaming conferences, class II gaming represents at least ten percent of the tribal gaming industry. The tribal gaming industry is presently estimated to gross 24 billion dollars annually. We are aware of comments by others that essentially no currently available or played games would survive the Proposed Rule. We believe that a similar result occurs under the Technical Standards Regulations. The Proposed Regulations constitutes a significant regulatory action that would have an annual effect on the economy of more than $100 million and would adversely affect in a material way the economy, a defined sector of the economy, jobs, or tribal governments. *See* Executive Order 12866 (September 30, 1993) (entitled "Regulatory Planning and Review"), as amended or replaced. As is discussed in these comments, the Proposed Regulations will further likely lead to less consistency and predictability in the regulation of tribal gaming, will promote disharmony between tribal and state governments, and within inherent tribal regulatory and other governmental functions, and are contrary to basic notions of equity. Under the jurisdictional framework inherent in the IGRA (under which statute various federal agencies and the various states have differing roles for class II and class III gaming), the proposed legislative amendments by the DOJ and the current regulatory actions by the NIGC further raise important federalism issues. *See* Executive Order 13132 (August 10, 1999) (entitled "Federalism"), as amended or replaced.

[173] Property interests protected by the Fifth and Fourteenth Amendment are not created by the Constitution; instead, such interests are created and measured by existing rules or understandings that stem from independent sources that secure certain benefits and support claims of entitlement to those benefits. *Brock v. McWherter*, 94 F.3d 242 (6th Cir. 1996). The right of tribes to engage in class II gaming, and the entitlement that flows therefrom, pre-dates and then was re-affirmed in the IGRA. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *see* 25 U.S.C. §2710(a)(2) (reaffirming the tribes' property interest by placing jurisdiction over class II gaming with the tribes); Senate Report, *supra*, at 3081 ("the [c]ommittee recogniz[ed] that tribal jurisdiction over class II gaming has not been previously addressed by Federal statute and thus there has heretofore been no divestment or transfer of such inherent tribal governmental powers by the Congress"). The Proposed Regulations violate the protections of the Constitution and implicates the takings provisions therein. *See also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (interference with investment backed expectations lead to a claim under the Fifth Amendment takings clause).

[174] *California v. Cabazon Band of Mission Indians, supra*, at 207 and 216 ("The Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory . . .' and "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development").

[175] *See* 25 U.S.C. §2701(4) ("a principal goal of Federal Indian Policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments"); 25 U.S.C. §2702 (The purpose of this chapter is – (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

Inherent in the protection of these vested tribal rights are the concepts of respect for tribal self-government, sovereignty and the unique legal relationship between the federal government and tribal governments, and the demonstration of that respect through meaningful government-to-government consultation on matters of import affecting tribal interests. The Proposed Regulations are precisely such a matter of import.

Against these important tribal rights, the Commission has not engaged in meaningful consultation with the Miccosukee Tribe and apparently has also not engaged in meaningful consultation with other individual tribal governments affected by the Proposed Regulations.[177] Against the backdrop of the law, the Commission's purported consultation process as to the Proposed Regulations resulted from an assumed conclusion by the Commission, not at all clear as discussed above, that further regulations by the Commission are once again "needed." We have a number of concerns on the process used by the Commission to arrive at the Proposed Rule.

First, this is not a situation of a need for emergency regulations as to either the Proposed Rule or the Technical Standards Regulations. The tribal class II gaming industry has developed slowly, over time, under the eyes of the Commission. A fair argument exists that the Commission's Advisory Committee process, which itself was initiated without formal consultation with affected tribal governments, did not conform to the Commission's own tribal consultation policy.[178]

Second, the Commission's method of hiring a contractor to assist the Commission in writing the Proposed Regulations lacked transparency and the contractor's role was defined by the Commission without consultation with affected tribal governments. The Commission apparently interviewed the ultimate contractor, BMM International ("BMM"), several months before the

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[176] Executive Order 13175 (November 6, 2000) (entitled "Consultation and Coordination with Indian Tribal Governments"); Presidential Memorandum for the Heads of Executive Departments and Agencies (September 23, 2004) (affirming that "President Nixon announced a national policy of self-determination for Indian tribes in 1970 . . . More recently, Executive Order 13175 . . . was issued in 2000 . . . I reiterated my Administration's adherence to a government-to-government relationship and support for tribal sovereignty and self-determination . . ."); Notice, Policy Statement, 69 Fed.Reg. 16973 (March 31, 2004) (sets forth tribal consultation policy of the NIGC).

[177] Again, our comments specifically address the interests of the Miccosukee Tribe. Although we do not and cannot speak for other tribal governments, we strongly suspect that many other tribal governments find themselves in the same position of a lack of consultation having occurred on the important issues raised in the Proposed Regulations.

We are confident that the lack of consultation is inadvertent and an oversight. The NIGC has a policy and established process for holding consultations with tribal governments. *See* Notice, Policy Statement, 69 Fed.Reg. 16973 (March 31, 2004). Whatever the cause of the non-consultation, our concern is to the actual effects that the process adopted by the NIGC has had on the ability of the federal government and affected tribal governments to have meaningful consultation on a government-to-government basis on the Proposed Regulations.

[178] The NIGC's recently adopted consultation policy states (a) "IGRA's statutory system of shared regulatory authority and responsibility for Indian gaming will work most effectively to further the act's declared policies and purposes, when the three involved sovereign governmental authorities work, communicate and cooperate with each other in a respectful government-to-government manner," (b) "to the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with federally recognized Indian tribes, when formulating and implementing NIGC administrative regulations, bulletins, or guidelines . . . which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA," (c) "the primary focus of the NIGC's consultation activities will be with individual tribes," and, (d) "the commission will promptly notify the affected tribes and initiate steps to consult and collaborate directly with the tribe(s) regarding the proposed regulation and its need, formulation, and implementation, and related issues and effects." Notice, Policy Statement, 69 Fed.Reg. 16973 (March 31, 2004).

Commission issued its formal Request for Proposal ("RFP"). The RFP was posted on the Commission's website only days before the expiration of the time (in fact, we understand that the Commission in the face of objection extended the time for responses to the RFP even if only for a few additional days). From the website for BMM (www.bmm.com), we understand that BMM was engaged solely by Australian gaming regulators until 1999, BMM established it first office for BMM North America in 2001, BMM's principal experience appears to be in the development of Internet gaming, and BMM's clients presently include Nova Gaming LLC (a provider of class II games and devices). We are not aware of BMM having substantial experience in class II gaming prior to BMM's involvement with the Commission's present rulemaking initiatives.

Third, the Advisory Committee formed by the Commission was arbitrarily small. We understand that the Advisory Committee consisted of seven members initially and was then reduced by the Commission to five members apparently because the Commission had not qualified all of the original members as "official representatives of the tribe" for which the members had been appointed to the Advisory Committee. The Advisory Committee did, and does, not include tribal representation from a number of regions in Indian country. Entire regions such as Minnesota, Idaho, the Great Plains, Oregon, New Mexico, Northern California, Arizona, and the Gulf Coast, were entirely denied representation on the Committee. The scope and viability of the operation of class II gaming has important jurisdictional impacts on all tribal governments and, therefore, the issues being addressed by the Committee impact all tribes whether engaged in class II or class III gaming.

Fourth, the notice given by the Commission inviting nominations by tribal governments for members of the Advisory Committee was couched in terms of the development of "technical standards" which minimized the importance of the Advisory Committee in terms of the Commissions apparent and actual goals of re-writing the jurisdictional framework for class II gaming through the Proposed Rule. We understand that various members of the Advisory Committee expressed this concern at a number of meetings of the Advisory Committee in that apparently at least some of the Advisory Committee members believed that they had been appointed to assist the Commission in the development of technical standards and not definitions regulations as are now included in the Proposed Rule.

Fifth, the Commission apparently came to the Advisory Committee with a pre-conceived outcome as to the Proposed Regulations on which the Commission purported to be consulting with the Advisory Committee. A comparison of the RFP, which establishes the work that the contractor was to provide the Commission, with the Proposed Rule, reveals that the Commission's fundamental approach in the Proposed Rule to developing additional standards for distinguishing between class II and class III gaming has essentially not changed through the purported consultation process.[179] The same appears to be true with respect to the framework for the Technical Standards Regulations.

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[179] As to the Proposed Rule, the Commission apparently circulated a long list of questions to Advisory Committee at the committee's first meeting as to the characteristics of class II games. A review of the form and substance of the list of questions reveals that the Commission already had in

Sixth, the Advisory Committee process deviated from established precedent and law. The Commission did not comply with the Federal Advisory Committee Act. No charter was adopted for the Advisory Committee. No record was maintained for the meetings of the Advisory Committee. We understand that requests were made on more than one occasion that meetings of the Advisory Committee be transcribed but the request was apparently refused by the Commission. We understand that representatives of the Commission took notes of the discussion but those notes apparently have not been circulated. On at least one instance, a substantial portion of the meeting of the Advisory Committee was closed to the public (in Cherokee, North Carolina). We understand that the Advisory Committee also held telephonic meetings that were not open to the public. Advance notice of meetings of the Advisory Committee was not published in the federal register.

The Miccosukee Tribe is greatly concerned with the process by which these regulations have been developed. Although the Commission assembled a tribal advisory committee ostensibly to participate in the process of formulating the Proposed Regulations, the Advisory Committee's input appears to have been extremely limited.[180] The process adopted by the Commission for the Proposed Regulations has apparently departed from the Commission's past use of tribal advisory committees as active participants not only in providing advice, but also in actually drafting rules. This time, however, we understand that little if any of the Advisory Committee's input was apparently incorporated into the regulations.

The Advisory Committee's tribal representatives, as compared to the Commission and its staff, should have had significant input into the selection of the contractor, and should have significant input into the manner in which the contractor, the Commission, and the tribal representatives interfaced and worked together, and the manner in which public comments to the proposed regulations were considered by the Commission. Tribal governments, either through their representatives on the Committee or through direct consultation with the Commission, should have been, but were not, given meaningful input into the issues to be discussed by the Committee. In all events, the input of the Advisory Committee's tribal representatives should have been given only after a significant number of tribal governments had been consulted so that the committee process

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mind the types of requirements that the Commission intended to impose through the Proposed Rule. The Commission notes in its notice to the Proposed Rule that several informal drafts were circulated to the Advisory Committee with respect to the matters that became the Proposed Rule; however, a review of these various drafts also reveals that the Commission's intent as to the Proposed Rule, both as to its structure and content, remained essentially unchanged through the consultation process. Additionally, a careful review of the advisory opinions on class II gaming issued by the Commission's offices prior to the initiation of the current rulemaking initiative reveals that substantially the same analytical framework applied in the advisory opinions has continued to be applied by the Commission in the Proposed Rule.

[180] *See* Letter from Advisory Committee to NIGC (September 13, 2006) (noting "we do not believe that the Commission's explanation of the views of the tribal representatives on the Advisory Committee comes close to expressing the level of our unified opposition to the various decisions made by the Commission in developing these regulations . . . In fact, there was almost no 'accord' between the Commission and the tribal representatives on the Advisory Committee . . . While the Commission made a few token concessions to our positions, it rejected every major substantive objection that we raised . . . Most of our major substantive objections were unanimous positions . . . While the Commission repeatedly stated that it heard our concerns, *we had no role in drafting the proposed regulations and with each draft circulated by the Commission, it became increasingly clear that our concerns were being ignored*," emphasis added).

in fact represented tribal interests. We did not receive any correspondence from members of the Advisory Committee pertaining to the Advisory Committee proceeding.

We also find it troubling that many of the advisory committee meetings focused on *legal* rather than technical standards.[181] Given the technical expertise of the individuals selected to serve on the committee, it seems that their input would have been better suited to the development of technical standards, as opposed as we understand to debating the law with the Commission's lawyers and the contractor as to definitional regulations in the Proposed Rule.

Finally, as useful as advisory committees have been, they are no substitute for government-to-government consultation with tribal government leaders.[182] We deem unacceptable the Commission's apparent expectation that a handful of tribal representatives on the Committee were to be the primary means of the Commission's consultation with tribes about the impact and content of this rulemaking. Although the Commission circulated later informal drafts of the Proposed Regulations to tribal governments at large, by that time the framework and most of the substantive provisions of the Proposed Regulations had already been resolved by the Commission. To constitute effective and meaningful consultation, tribal governments must be afforded the opportunity to participate early in the rulemaking process when comments may still be effectively considered. That did not happen here as to the Proposed Regulations.[183]

V. NIGC Failed to Consider Viable and Less Burdensome Alternatives.

Meaningful consultation might well have avoided the current situation of the Proposed Regulations which violates the IGRA and established law.[184] Meaningful consultation is intended to bring to

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[181] *See Id.* ("While none of us are attorneys, we do have significant experience in the area of gaming generally and Indian gaming specifically . . . Thus, even though we were generally prevented from consulting with our attorneys during the meetings of the Advisory Committee, we had no doubt that the requirements being developed by the Commission bore little relationship to any bingo game ever played . . . We were also very troubled by statements by Commission staff that court decisions limiting Class II gaming must be strictly followed (apparently correctly decided), but that it was free to disregard favorable decisions on Class II gaming (apparently wrongly decided) . . . The proposed regulations reflect this double standard . . . In our collective opinion, the Commission intended from the beginning to develop regulations to significantly limit the commercial viability of Class II gaming").

[182] While the Tribe did receive invitations from the NIGC to attend "consultation meetings" the invitations did not appear to refer or to relate to the Proposed Rule or the Technical Standards Regulations. Towards that same end, discussions with tribal associations (*e.g.*, NCAI, NIGA, or CNIGA), or at conferences held by tribal associations, may provide information valuable to the consideration of the proposed legislative amendments or related regulations but do not constitute consultation on a government-to-government basis with individual tribal governments. Tribal associations are not empowered to bind or to speak for individual tribal governments and, further, many tribes that will be affected by the proposed legislative amendments and related regulations may or may not even belong to such tribal associations. Moreover, holding group panel discussions with hundreds of people present (including persons representing a variety of tribal and non-tribal interests), as apparently occurred at NCAI, NIGA, and CNIGA meetings, does not constitute government-to-government consultation with individual tribal governments. At best, such meetings constitute informational meetings.

[183] The Tribe's concern as to the consultation process adopted by the Commission is that the Commission may view consultation as a "to-do" procedural item and not one of substantive import. If so, the Commission's apparent view of the meaning and effect of government-to-government consultation is at odds with federal Indian policy and the publicly stated policies of the current Administration.

[184] Towards that same end, a change in the current regulations might not be effective or even necessary. A careful review may reveal that the law, as cited and discussed in these comments, on the distinction between class II and class III gaming is presently clear. Or, further discussions may well reveal that alternate regulatory mechanisms such as negotiated rulemaking, if a regulation is necessary, or a bulletin or interpretive rule, if an informal statement is adequate, should be considered.

light viable alternatives respectful of the important tribal interests to be affected by the proposed governmental action.

A. Viable Alternatives to the Proposed Rule.

Through the Proposed Rule, the Commission apparently seeks to add extra-statutory restrictions on the definitions of bingo gaming and allowable technology. The Commission further apparently seeks to add an extra-statutory pre-condition to tribal gaming that a tribe obtain a certification that a game meets the Commission's detailed definition of class II gaming before the tribe may offer the game for play as class II gaming without necessity of a compact or Secretarial procedures.

Congress, however, intended in the IGRA for tribal governments to have flexibility as to game design for class II gaming, and to have maximum flexibility as to the technology used with that gaming. Congress excluded from class II gaming slot machines, and their functional equivalents "facsimiles" in which one player can play with or against a machine as compared to with or against other players. Congress further excluded from class II gaming certain lottery games offered by state lottery games; the excluded games included games with pre-vested cards such as pull-tabs if not played at the same location as the game Congress described as bingo, and games played with non pre-vested cards if the method of play was the same as that offered by state lotteries. Congress further did not intend for tribes to be confronted with pre-conditions to gaming other than the adoption and approval by the tribe, with subsequent approval by the Chairman of the Commission, of an ordinance or resolution authorizing gaming. Even as to the approval by the Chairman of tribal gaming ordinances, the approval of tribal gaming ordinances was made mandatory under the IGRA if certain carefully enumerated requirements were satisfied. The Proposed Rule, and the fundamental regulatory framework underlying the Proposed Rule, thus violates IGRA and established law.

We don't believe that any changes are necessary as to the Commission's current regulatory definitions for tribal gaming. However, assuming that the Commission is in fact seeking clarity in its own definitions, and recognizing that the Commission, like tribal governments, must adhere to IGRA and established law, a viable alternative would have been for the Commission to do no more than: (1) provide in its definition of "game similar to bingo" that a game similar to bingo, stops being class II gaming and starts being a class III lottery game, when the method of play is such that: (a) the game is played without *a* designated winning pattern, (b) the game can end before a player has achieved a designated winning pattern, or, (c) ***none*** of the objects used in the play of the game are drawn or electronically determined during the game (which under the classification scheme enacted by Congress in IGRA makes the game an instant bingo game);[185] (2) provide in its definition of "facsimile" that a "facsimile" means a machine or device [that but for the IGRA

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[185] We believe that the NIGC goes too far in the Proposed Rule by excluding from games similar to bingo games of bonanza bingo in which some but not all of the balls or objects are drawn or determined before the play of the game thereby excluding games that Congress intended as class II bingo gaming.

would be subject to 15 U.S.C. 1171 (a)(2) or (3) *and*] by which a player plays a game of chance without at least one other player playing the game at the same time; and, (3) eliminate the provisions of proposed part 546 (which as discussed above are in fact arbitrary, capricious, and contrary to law). The Commission would further make clear that a card used in the play of a class II game does not constitute a machine or device so as to avoid the confusion in the current Proposed Rule between class III facsimiles (which under the IGRA applies to machines or devices) and the "medium" used for the cards played with class II gaming (which medium in and of itself is not relevant to game classification under the IGRA including as to the Sub-games to bingo).

Lastly, a viable alternative to the Proposed Rule would leave the existing 2002 definitions regulations intact and provide that tribal regulatory agencies would make the first classification determination as to class II gaming, the Commission would have an opportunity within a reasonable time to concur or object, and the Commission's action would be a final agency action subject to judicial review.

Such alternatives would make the Commission's regulatory initiative as apparently intended in the Proposed Rule, if the Commission determined to move forward at all, consistent with IGRA and existing law and would avoid the legal difficulties with the current Proposed Rule.

Additionally, instead of subjecting all class II gaming played with technology to the detailed requirements of the Proposed Rule, the Commission should consider the addition of substantial grandfather provisions allowing the continued play of existing, related, or comparable games for which favorable treatment has already been afforded by the courts or the Commission. Alternatively, the Commission should provide that the specific and detailed definitional requirements in the Proposed Rule are not exclusive but instead are merely examples of characteristics the Commission views to constitute class II gaming with the Commission providing that a game is not necessarily outside of class II gaming merely because the game lacks some or all of the characteristics in the proposed part 546. Alternatively, the Commission should delay the implementation of the Proposed Rule, if any form of the rule is adopted, for a minimum of eighteen months to allow the affected parties adequate time to address the impacts of the Proposed Rule.

B. Viable Alternatives to the Technical Standards Regulations.

Again, the Tribe does not oppose technical standards for the play of class II gaming, or the security and integrity that such standards provide, but the Tribe does object to the apparent attempt by the Commission to impose requirements that under the IGRA are for tribal governments to establish. The IGRA intended that tribes have the "opportunity to take advantage of modern methods of conduction class II games and the language regarding technology is designed to provide maximum flexibility." Nonetheless, and against the plain language and intent of the IGRA, the net effect of the Commission's Technical Standards as written will be to specifically limit, preclude, or discourage both old and new technologies in direct contravention of the IGRA.

Against the Commission's stated intention for the Technical Standards Regulation of "The Commission has determined that it is in the best interests of Indian gaming to adopt technical standards . . .because no such standards currently exist,"[186] the Commission has not demonstrated a need or purpose for the Technical Standards Regulations. We would strongly suggest that the Commission schedule a series of regional consultations with tribal governments, tribal regulators, and tribal operators, and their consultants (including technical and legal advisers with experience with existing, previous, and planned product designs and implementations in the United States and specifically in tribal class II gaming) to review past, present, and future technology trends, and, if a need and purpose for the regulations is identified, to establish agreed objectives for the Technical Standards Regulations (with appropriate limitations as to areas reserved to tribal governments, regulators, and operators, consistent with the IGRA, its legislative history, and the law), and to revamp the Technical Standards Regulations.

In any event, the Technical Standards Regulations should be revised to include provisions that grandfather existing games, or which allow greater tribal discretion as to variances without involvement by the Commission.

VI. Conclusion.

The Indian Gaming Regulatory Act was intended to be part of America's effort at recompense for its history and track record in dealing with tribal governments. The IGRA recognized a federal-tribal relationship intended to allow tribal governments to rebuild and maintain their communities through class II and class III gaming with minimal federal or state interference.

The Miccosukee Tribe of Indians of Florida has recognized the opportunity provided in the IGRA. The Tribe uses gaming revenues to fund important governmental programs including a health clinic, police department, court system, day care center, senior center, Community Action Agency, as well as an educational system ranging from a Head Start pre-school program through senior high school, adult, vocational and higher educational programs and other social services, and to protect important resources such as the Everglades. The IGRA has not been satisfactory in all ways, but at the least tribal governments should be allowed to receive the full benefit of the IGRA as the IGRA is written.

The Tribe believes in the importance of the regulation of its gaming activities. The Tribe has created its own, independent regulatory body to govern gaming on the Tribe's lands. The Miccosukee Tribe of Indians of Florida Gaming Commission is well-funded and is comprised of experienced regulators who have their own investigative, oversight and enforcement authority. The tribal gaming commission carefully regulates the Tribe's gaming operations, allowing the Miccosukee people to use gaming to rebuild and support their culture in a clean, responsible way,

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[186] Technical Standards Regulation, *supra*, 71 Fed. Reg. 46336.

without a need for intrusive federal or state interference. As provided in the IGRA, the Miccosukee Tribal Gaming Commission is the primary regulator of the gaming conducted by the Miccosukee Tribe on its lands.

While the Miccosukee Tribe attempts to use Class II gaming rules to benefit its people, the Commission continues to take a more restrictive view of Class II gaming, especially as it pertains to the use of technology for bingo and pull tab gaming. Notwithstanding that the Tribe has used and is using Class II gaming to support its culture, traditions, and governmental programs, the federal government seeks unilaterally to change the nature of its relationship with Indian tribes by creating regulations through the Proposed Rule (and the related Technical Standards Regulations) that do not reflect the intent of Congress in the IGRA as to class II gaming.

Congress intended for tribal governments to have maximum flexibility in game design and in technology in playing the games of chance identified by Congress as class II gaming. The Tribe has found it difficult to take advantage of these rights since the Commission first enacted regulations in 1992. For tribal governments not able to obtain a compact after the *Seminole* decision, the restrictive nature of the Commission's class II regulations, and continued interference by the Commission in tribal regulation of tribal gaming, is unfortunate. The Commission may be well intentioned, but the effect of the regulation of Class II gaming as contained in the Proposed Regulations is yet another retreat toward the days when America changed the rules simply because it no longer liked the original deal it entered with tribal governments.

The federal government should not unilaterally change its relationship with tribal governments as to tribal gaming. The Miccosukee Tribe of Indians of Florida respectfully urges the Commission not to adopt the Proposed Rule or the Technical Standards Regulations. As always, the Tribe remains willing to meet and to discuss with the Commission viable alternatives on matters of mutual import but any such alternatives must comply with the law and protect the Tribe's interests.

Nothing in these comments or this letter constitutes or should be construed as a waiver of any rights of the Miccosukee Tribe of Indians of Florida under the law or otherwise. The Tribe reserves the right at any time to take any and all positions, including positions that are different, or even contrary, to those stated above.

Very truly yours,

Dexter Lehtinen

Dexter W. Lehtinen, Esq.
General Counsel

cc: Senate Indian Affairs Committee Members
House of Representatives Committee on Resources Members
Office of Management and Budget,
Office of Information and Regulatory Affairs